88-1431

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FERINAND MARCOS, IMELDA MARCOS, AND RAMON AZURIN,
Petitioners,

v.

REPUBLIC OF THE PHILIPPINES,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-6091

THE REPUBLIC OF THE PHILIPPINES,
Plaintiff-Appellee,

v.

FERDINAND E. MARCOS, *et al.*,
Defendants-Appellants,

Argued and Submitted Feb. 10, 1988

Decided Dec. 1, 1988

Special Concurrence, Dec. 2, 1988

Appeal from the United States District Court
for the Central District of California

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Richard K. Willard, Asst. Atty. Gen., James M. Spears, Deputy Asst. Atty. Gen., Robert C. Bonner, U.S. Atty., Robert E. Kopp, John F. Cordes, and John P Schnitker, Asst. U.S. Attys., Washington, D.C., for the amicus curiae U.S.

Before BROWNING, Chief Judge, ANDERSON,* SCHROEDER, FLETCHER, PREGERSON, ALARCON, CANBY, NORRIS, BEEZER, BRUNETTI, and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

The Republic of the Philippines (the Republic) brought a civil suit against its former president, Ferdinand Marcos, and his wife Imelda (the Marcoses), asserting claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, and other applicable law. The district court on June 25, 1986 entered a preliminary injunction enjoining the Marcoses from disposing of any of their assets save for the payment of attorney fees and normal living expenses. The Marcoses appealed. A panel of this court reversed, 2-1. 818 F.2d 1473 (9th Cir.1987). We took the case en banc and now affirm the district court.

Federal Jurisdiction

The Republic alleges that the Marcoses engaged in mail fraud, wire fraud, and the transportation of stolen property in the foreign or interstate commerce of the United

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* Judge Anderson heard argument and participated in the discussion of this case, but died before the opinion was finally agreed upon.

States. The acts alleged are crimes under 18 U.S.C. §§ 1341, 1343, and 2315. The Republic alleges that the acts were repeated, forming a pattern of predicate acts under RICO, 18 U.S.C. § 1961, and thereby giving rise to civil liability under RICO, 18 U.S.C. § 1964.

Contrary to the contention of the Marcoses, the Republic as a governmental body is a person within the meaning of 18 U.S.C. § 1961(3). *Illinois Department of Revenue v. Phillips*, 771 F.2d 312 (7th Cir.1985). The foreign nature of the Republic does not deprive it of statutory personhood. *Cf. Pfizer, Inc. v. Government of India*, 434 U.S. 308, 98 S.Ct. 584, 54 L.Ed.2d 563 (1978). Accordingly, the Republic has standing to assert the RICO claims.

Contrary to the contention of the Marcoses, the complaint, as interpreted by the district court, sufficiently alleges a RICO offense. The Republic alleges that the Marcoses and the other defendants arranged for the investment in real estate in Beverly Hills, California of $4 million fraudulently obtained by the Marcoses; that the Marcoses arranged for the creation of two bank accounts in the name of Imelda Marcos at Lloyds Bank of California totaling over $800,000 also fraudulently obtained by the Marcoses; and that the Marcoses transported into Hawaii money, jewels, and other property worth over $7 million also fraudulently obtained by them. Criminal conduct under RICO "forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S 479, 496 n. 14, 105 S.Ct. 3275, 3285, n. 14, 87 L.Ed.2d 346 (quoting 18 U.S.C. § 3575(e)). The purposes of the acts here alleged are the same—to invest and to conceal fraudulently-obtained booty. The results are the same—the investment of the booty. The principals are the same—the Marcoses. The victim is

the same—the Republic. The episodes are not isolated events. They represent a plan and a practice of getting the fruits of fraud out of the Philippines and into the assumed safety of the United States. If proved, the allegations show acts that form a pattern.

Contrary to the contention of the Marcoses, the complaint as read by the district court also alleges a RICO enterprise. A RICO enterprise has been found to consist of "a group of individuals associated in fact for the purpose of illegally trafficking in narcotics . . ., utilizing the United States mail to defraud . . ., and corruptly influencing . . . the outcome of state court proceedings." *United States v. Turkette*, 452 U.S. 576, 579, 101 S.Ct. 2524, 2526, 69 L.Ed.2d 246 (1981). Here there is alleged to be a group of individuals associated in fact for the purpose of illegally investing the fruits of fraud and illegally using the mails and wire and illegally transporting in interstate commerce the fruits of the fraud.

The effect on the commerce of the United States of engaging in mail or wire fraud or bringing stolen property into the country is palpable. The Marcoses are mistaken in arguing that such criminal acts have no consequences for commerce to or in this country. The criminal enterprise which they are charged with conducting consisted in operations taking place within the United States. These operations had multiple effects on the domestic and foreign commerce of this country. If the operations were criminal, the operators incurred criminal liability under our law. *United States v. Stratton*, 649 F.2d 1066, 1075 (5th Cir.1981) (appearance of out-of-state litigants before court that was a criminal RICO enterprise); *United States v. Altomare*, 625 F.2d 5 (4th Cir.1980) (interstate telephone calls perpetuating RICO enterprise affected interstate commerce). The Republic's allegations are sufficient to establish federal jurisdiction. 18 U.S.C. § 1964.

Pendent Jurisdiction

The gravamen of the Republic's entire case is the allegation that the Marcoses stole public money:

> During his twenty years as President of the Philippines, *Mr. Marcos used his position of power and authority to convert and cause to be converted, to his use* and that of his friends, family, and associates, *money, funds, and property belonging to the Philippines and its people.* Complaint, ¶ 12 (emphasis added).

This common allegation supports not only plaintiff's RICO claims but also the eight claims for conversion, fraud and deceit, constructive fraud, constructive trust, breach of implied contract, quiet title, accounting, and subrogation. The claims for a constructive trust, to quiet title, an accounting, and subrogation merely set forth different forms of relief for the same underlying wrongs.

The Republic's strategy of bringing suit in a number of other jurisdictions is not decisive of the question whether the claims are such that they would ordinarily be tried in one judicial proceeding. The present location of the sought-for funds in banks in various countries is not determinative as to the underlying wrongs alleged in the complaint. The claims brought in this suit would ordinarily be tried in a single case. In both the RICO and non-RICO claims, the Republic alleges that the Marcoses converted public funds while in office. The district court concluded:

> This Court has pendent jurisdiction over plaintiff's other claims under state and foreign law in that such claims arise from a common nucleus of operative fact and are so intertwined with other matters pending before the court as to make the exercise of such jurisdiction over these claims appropriate.

The district court was correct in asserting pendent jurisdiction over these claims. They derive from "a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). The power of a federal court to decide pendent claims is "wide-ranging." *See Carnegie-Mellon Univ. v. Cohill*, ——U.S. ——, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988). The exercise of the power is discretionary but ordinarily the power if it exists is exercised; only exceptionally is the power not employed. *See* C. Wright, A. Miller & E. Cooper 13B *Federal Practice and Procedure* § 3567.1 (1984 and 1988 Supp.).

The common nucleus of operative facts that binds the RICO and non-RICO claims together is pleaded in paragraph 12, which is incorporated by reference into each claim for relief. To prove the predicates for RICO that allegedly occurred in this country, the Republic will have to prove theft, the acceptance of bribes, extortion, conspiracy, and similar acts in the Marcoses' conduct of the government in the Philippines. For example, to prove that stolen money was unlawfully transported in the United States, the Republic will have to prove theft in the Philippines. The operative facts necessary as part of the proof of the RICO claim are also the facts necessary to prove the theft. The RICO claims cannot be proved without getting deeply into the pendent claims and proving some or all of them. Because the acts charged, if proved, support both the RICO and the non-RICO claims, the district court has subject matter jurisdiction over all claims in the Republic's complaint.

True, the pendent claims may involve more property than that which entered into or affected the foreign or domestic commerce of the United States. The dissent appears to assume that jurisdiction over the pendent claims cannot extend beyond this property. But that is

not the law. Properly pendent claims need not be for the identical property involved in the federal cause of action. The pendent claims remain within the court's jurisdiction if the vital facts that must be proved as predicates of the RICO claims are the same as those that must be proved to establish the extortion, bribery, theft, fraud, and conversions alleged by the pendent claims.

At "every stage of the proceeding" the district court must exercise discretion as to the pendent claims. *See Carnegie-Mellon Univ. v. Cohill*, 108 S.Ct. at 618. In light of a more fully developed record than that now before this court, the district judge may conclude that some or all of the pendent claims should be dismissed notwithstanding our holding that the district court has the power to assert jurisdiction over those claims. *Gibbs*, 383 U.S. at 727, 86 S.Ct. at 1139. *See also* 3A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 18.07[1.-3] at 18-36-37 (2d ed. 1987). As of the record now before us, pendent jurisdiction exists and supports an injunction based on the pendent claims.

Act of State and Political Question

Before determining whether issuance of an injunction was appropriate we consider two defenses which, if accepted, would block trial of the case: the Marcoses maintain, first, that their acts are insulated because they were acts of state not reviewable by our courts; and second, that any adjudication of these acts would involve the investigation of political questions beyond our courts' competence.

Acts of State. The classification of certain acts as "acts of state" with the consequence that their validity will be treated as beyond judicial review is a pragmatic device, not required by the nature of sovereign authority and inconsistently applied in international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-22, 84 S.Ct. 923, 936-37, 11 L.Ed2d 804 (1964). The pur-

pose of the device is to keep the judiciary from embroiling the courts and the country in the affairs of the foreign nation whose acts are challenged. Minimally viewed, the classification keeps a court from making pronouncements on matters over which it has no power; maximally interpreted, the classification prevents the embarrassment of a court offending a foreign government that is "extant at the time of suit." *Id.* at 423, 84 S.Ct. at 940.

The "continuing vitality" of the doctrine depends on "its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign relations." *Id.* at 427-28, 84 S.Ct. at 939-40. Consequently, there are "constitutional underpinnings" to the classification. *Id.* at 423, 84 S.Ct. at 938. A court that passes on the validity of an "act of state" intrudes into the domain of the political branches. The proper application of the doctrine is illustrated by *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92 (C.D.Cal. 1971), *aff'd per curiam*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972).

As a practical tool for keeping the judicial branch out of the conduct of foreign affairs, the classification of "act of state" is not a promise to the ruler of any foreign country that his conduct, if challenged by his own country after his fall, may not become the subject of scrutiny in our courts. No estoppel exists insulating a deposed dictator from accounting. No guarantee has been granted that immunity may be acquired by an ex-chief magistrate invoking the magic words "act of state" to cover his or her past performance.

The classification might, it may be supposed, be used to prevent judicial challenge in our courts to many deeds of a dictator in power, at least when it is apparent that sustaining such challenge would bring our country into a hostile confrontation with the dictator. Once deposed,

the dictator will find it difficult to deploy the defense successfully. The "balance of considerations" is shifted. *Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940. *A fortiori*, when a ruler's former domain has turned against him and seeks the recovery of what it claims he has stolen, the classification has little or no applicability. The act of state doctrine is supple, flexible, ad hoc. The doctrine is meant to facilitate the foreign relations of the United States, not to furnish the equivalent of sovereign immunity to a deposed leader.

In the instant case the Marcoses offered no evidence whatsover to support the classification of their acts as acts of state. The burden of proving acts of state rested upon them. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695, 96 S.Ct. 1854, 1861, 48 L.Ed.2d 301 (1976). They did not even undertake the proof. The United States, invited by the court to address this matter as an amicus, assures us that the Executive does not at present see the applicability of this defense. *Brief of the United States of America as Amicus Curiae*, p. 11. The act of state doctrine, the Executive declares, has "no bearing" on this case as it stands. As the doctrine is a pragmatic one, we cannot exclude the possibility that, at some later point in the development of this litigation, the Marcoses might produce evidence that would warrant its application. On the present record, the defense does not apply.

Political Questions. Bribetaking, theft, embezzlement, extortion, fraud, and conspiracy to do these things are all acts susceptible of concrete proofs that need not involve political questions. The court, it is true, may have to determine questions of Philippine law in determining whether a given act was legal or illegal. But questions of foreign law are not beyond the capacity of our courts. *See Zschernig v. Miller*, 389 U.S. 429, 461, 88 S.Ct. 664, 681, 19 L.Ed.2d 683 (1968) (Harlan, J. concurring); Fed.R.Civ.P. 44.1 (allowing consideration of foreign law

materials). The court will be examining the acts of the president of a country whose immediate political heritage is from our own. Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape. *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir.1962).

The Convenience of the Forum

The Marcoses maintain that the Republic's action should have been dismissed, even if the district court had jurisdiction, on the ground of *forum non conveniens*. They point to the foreign character of the plaintiff, the nature of the Republic's claims about the Marcoses' conduct in office, and the fact that the court will be called upon to decide questions of Philippine law. The inconvenience of the forum was argued by the Marcoses to the district court. But the court did not address the argument. On the present record the district court did not abuse its discretion in refusing to dismiss the Republic's action on *forum non conveniens* grounds before issuing the preliminary injunction.

Injunction Rather Than Attachment

Fed.R.Civ.P. 64 makes available all remedies for the seizure of property "in the manner provided by the law of the state in which the district court is held." The Marcoses argue that the freeze of their assets is an attachment and that California law permits attachment only in connection with a claim based upon a contract.

Cal.Civ.Proc.Code § 483.010(c). The Marcoses are mistaken. While a freeze of assets has the effect of an attachment, it is not an attachment. *F.T.C. v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir.1982). The court has power to preserve the status quo by equitable means. A preliminary injunction is such a means. *F.T.C.*, 668 F.2d at 1112.

The Standard for Issuance of the Injunction

The issuance of the preliminary injunction was not an abuse of discretion by the district court if that court properly concluded that the Republic had shown the probability of success on the merits of its pendent claims and the possibility of irreparable injury, or that the pendent claims raised serious questions and the balance of hardships tipped sharply in favor of the Republic. *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir. 1987). "These are not two distinct tests, but rather the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987) (quoting *San Diego Committee Against Registration and the Draft v. Governing Board of the Grossmont Union High School Dist.*, 790 F.2d 1471, 1473 n. 3 (9th Cir.1986)). "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979) (citation omitted).

For the purposes of injunctive relief, "serious questions" refers to questions which cannot be resolved one way or the other at the hearing on the injunction and

as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo. Serious questions are "substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir.1952) (Frank, J.). Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a "fair chance of success on the merits." *National Wildlife Fed'n v. Coston*, 773 F.2d 1513, 1517 (9th Cir.1985) (Duniway, J.). Applying these principles and definitions to this case, we conclude that the district court did not abuse its discretion in granting the preliminary injunction.

The district court stated orally that "the hardship is clearly on the side of the plaintiff." The district court also made the written finding that there was more than a mere possibility of irreparable harm; in fact, it concluded that the Republic "*would* be irreparably injured if [the injunction] were not issued." (emphasis added). The Marcoses have offered no evidence of any hardship they would suffer if the injunction were issued. Indeed, the district court stipulated in the injunction that the Marcoses may use their assets to cover normal living expenses and legal fees. Irreparable injury was weighed against zero evidence of hardship. On this record, the balance of hardships tipped decidedly in the Republic's favor.

The district court also concluded that the Republic had a "substantial likelihood" of prevailing on the merits. Although we do not read this as a finding of *probability* of success, we do believe that it represents a finding that the Republic has at least a fair chance of success, which is all that is required. *See Benda*, 584 F.2d at 315. We agree with the district court that the Republic has at

least a fair chance of prevailing on the merits, including on the merits of its constructive trust claim.

The Republic presented evidence that in February 1986 the Marcoses had transported from the Philippines to Hawaii $8.2 million worth of cash, negotiable instruments, jewelry, and other property, allegedly derived from the Marcoses' wrongdoing in the Philippines. Ferdinand Marcos swore by affidavit that it had not been his intention to go to Hawaii and that he had been taken there involuntarily by the government of the United States. But as he sought to recover from the United States Customs all of these items he clearly intended to introduce them into the United States. He used the United States mail and telephone services for this purpose.

The Republic also presented evidence that since at least 1968 the Marcoses had a checking account at a bank in Beverly Hills, California and that this account was used to make payments of $200,000 to "William Saunders" and $100,000 to "Jane Ryan." The Republic introduced evidence that these names were aliases under which Ferdinand Marcos and Imelda Marcos acted. The Republic presented evidence of the creation by the Marcoses in 1970 of a Lichtenstein entity entitled the "Sandy Foundation," which in effect was a trust to make investments for the benefit of the Marcoses and their children, Imelda, Ferdinand, and Irene, and which was funded by the Marcoses with an initial capital of 100,000 Swiss francs. The Republic presented evidence that "Jane Ryan" and "William Saunders" transferred their accounts to this trust and that Credit Suisse, a Zurich bank, was "the administering bank" of the trust. The Republic presented evidence of correspondence by the Marcoses as customers of that bank and the use by Imelda Marcos of the alias of Jane Ryan in dealing with that bank.

According to the Republic's evidence, a code was worked out for contacts between the Marcoses and the trust. According to a copy of a memorandum signed by Ferdinand Marcos, if he cabled "Happy Birthday" to the bank, its Hong Kong representative, Ralph Klein, would proceed to Manila and "contact him through Col. Fabian C. Ver." (Colonel Ver is now General Ver, associated with the Marcoses in power and in their flight from the Philippines.)

In addition to this evidence of secretive dealings in substantial sums of money in the course of which the Marcoses used a bank in California, the Republic submitted a statement by the Minister of the Budget of the Philippines as to the total salaries authorized to be paid Ferdinand Marcos as president from 1966 to 1985 and Imelda Marcos as a minister of government from 1976 to 1985. The total authorized amount is P 2,288,750, in dollars less than $800,000. The Republic submitted what purports to be a balance sheet signed by Ferdinand Marcos as part of a tax return stating his assets as of December 31, 1966 as P 150,000, in dollars less than $60,000. The Republic submitted the sworn deposition, executed June 16, 1986, of Rafael Fernando, Representative and Coordinator on the West Coast of the United States of the Presidential Commission on Good Government of the Republic of the Philippines. Fernando declares that Swiss bank authorities have documented to the government of the Republic the existence of bank accounts owned by Ferdinand Marcos in the amount of $200 million and have reported to the Republic the existence of other accounts held for or on behalf of him in the amount of approximately $1.3 billion.

The Marcoses' clandestine dealings with Credit Suisse and the Lichtenstein trust and the discrepancy between the purported balance sheet of 1966 and the reported assets of 1986, coupled with the reported authorized salaries of the Marcoses as members of the government of

the Republic, give rise to the inference that very large sums of money were amassed by the Marcoses by the unlawful means alleged by the Republic. The inference depends in part on the hearsay statements of Fernando. It was within the discretion of the district court to accept this hearsay for purposes of deciding whether to issue the preliminary injunction. *Flynt Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984) ("The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial."); *see also K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088 (9th Cir.1972) (trial court may consider allegations in verified complaint in issuing preliminary injunction). No affidavits countering the inference were presented by the Marcoses. *See K-2 Ski Co.*, 467 F.2d at 1089. The Republic's case remains to be proved. The Republic has put forward enough to show a fair chance of succeeding with its proof.

The Scope of the Injunction

The injunction is directed against individuals, not against property; it enjoins the Marcoses and their associates from transferring certain assets wherever they are located. Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach. *See, e.g., Steele v. Bulova Watch Co.*, 344 U.S. 280, 289, 73 S.Ct. 252, 257, 97 L.Ed. 319 (1952) (district court "in exercising its equity powers may command persons properly before it to cease to perform acts outside its territorial jurisdiction") (citations omitted).

A court has the power to issue a preliminary injunction to prevent a defendant from dissipating assets in order to preserve the possibility of equitable remedies. *See, e.g.,*

F.T.C. v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir.1982) (preliminary injunction appropriate to preserve the possibility of equitable remedies). The injunction here enjoins the defendants from secreting those assets necessary to preserve the possibility of equitable relief.

Although the gravamen of the complaint is that the Marcoses converted public property to their own use, the seventh claim for relief, which alleges a constructive trust, states an equitable cause of action and seeks equitable relief: "[The Marcoses], by virtue of their position as President of the Philippines and Governor of Manila, respectively, occupied positions of trust as to the Philippines and its people. [The Marcoses] violated said trust by their numerous acts of conversion, fraud, deceit, constructive fraud, civil conspiracy, acts of racketeering, and other unlawful acts." As the result of these asserted violations of trust, the Marcoses acquired specific funds and real property, including the accounts with Lloyds Bank, the real property in Beverly Hills, the deposits with the Swiss banks and the property brought into Hawaii. Complaint, ¶¶ 62-67. In granting the preliminary injunction, the district court specifically found "that the Philippines will be entitled to an accounting for, and to impose a constructive trust upon, the property subject to this Order." The district court found the preliminary injunction necessary to preserve the possibility of equitable relief. On this record, the district court did not abuse its discretion in entering an injunction of this scope.

The district court remains free to modify or dissolve the preliminary injunction if warranted by developments in this case subsequent to the noticing of this appeal. *Lyng v. Northwest Indian Cemetery Protective Assoc.*, —— U.S. ——, 108 S.Ct. 1319, 1330, 99 L.Ed.2d 534 (1988). *See also* 7 J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 65.07 at 65-114 (2d ed. 1987).

In Summation. Jurisdiction to hear the Republic's claims and to enter the preliminary injunction exists. A serious question of liability has been presented and the Republic has a fair chance of success on the merits of its case. The Marcoses have not presented any preclusive defense. The scope of the injunction is justified. It was imperative for the district court to preserve the status quo lest the defendants prevent resolution of the case by putting their property beyond the reach of the court. Hardship to the Republic would have been great and irreparable if the district court had not taken its prudent, amply justified action to keep the Marcoses' assets from disappearing.

AFFIRMED.

SCHROEDER, Circuit Judge, with whom CANBY, Circuit Judge, joins concurring in part and dissenting in part.

I join in the majority's conclusion that there is a well-pleaded RICO claim providing federal subject matter jurisdiction. I agree further that the act of state doctrine is not a threshold bar to considering the activities of the defendants during the time that Mr. Marcos was the Philippine head of state. Those were the principal issues that a majority of the three-judge panel considered and that we undertook to decide in this en banc proceeding.

The injunction we review, however, was entered only a week after this suit was filed, and the record before us is minimal. It does not provide support for the majority's resolution of the further issues it must reach, without reasoned analysis, in order to uphold this injunction. I therefore dissent from the affirmance.

The injunction is based upon the district court's exercise of pendent jurisdiction, not federal question jurisdic-

tion. It is based on a complaint alleging, in the most sweeping of generalities, pendent claims of fraud and conversion by the Marcoses over the course of twenty years. The pendent claims are alleged to be violations of as yet unspecified laws of as yet unspecified states and countries. The district court's injunction purports to reach over a billion dollars worth of assets, the bulk of which are located in Switzerland. *See Republic of the Philippines v. Marcos*, 818 F.2d 1473, 1476 (9th Cir. 1987).

To affirm this injunction, the majority must hold that the district court properly exercised pendent jurisdictional authority to reach all of the Marcoses' property, wherever located. I cannot agree. The basis for federal jurisdiction is contained in RICO allegations of illegal activities concerning assets now located in the United States. There has been no showing that these claims arise in any way from the same allegedly wrongful transactions through which the Marcoses acquired other property located elsewhere. Nor does the record disclose any reason why a court in California, as opposed to courts in the Philippines or Switzerland, should decide claims to property stolen from the Philippines and transported to Switzerland. I therefore part company with the majority when it affirms on this record the district court's issuance of a preliminary injunction preventing the Marcoses from disposing of any assets anywhere in the world.

In my view the existence of pendent jurisdiction over claims reaching all the Marcoses' assets has not yet been established. As explained more fully below this injunction should be vacated and the matter remanded to the district court for consideration of pendent jurisdiction and other issues on the basis of a fuller record.

BACKGROUND

The plaintiff sought an injunction to be entered solely in the exercise of pendent jurisdiction because RICO does not authorize injunctive relief. *See Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987). RICO, however, does provide the requisite federal question jurisdiction.

For the RICO predicate acts in violation of the laws of the United States, the complaint alleged violations of 18 U.S.C. §§ 1341, 1343, 2314, and 2315. The alleged racketeering activities essentially involve mail and wire fraud and the importation of stolen goods into the United States. The showing before the district court of the Marcoses' actual holdings in the United States included the Marcoses' interests in California real estate, the existence of a bank account with a California bank, and the transporting to Hawaii of $8.2 million in funds and property.

The district court granted the injunction in conclusory fashion, finding:

> (1) That there is a substantial danger that, if this Order were not issued, the parties against whom this Order is directed would transfer or conceal funds, property, books and records, placing said items beyond the Court's process and recovery by the Philippines in this action.
>
> (2) That the Philippines therefore would be irreparably injured if this Order were not issued.
>
> (3) That there is a substantial likelihood that the Philippines will prevail in this action, and that the Philippines will be entitled to an accounting for, and to impose a constructive trust upon, the property subject to this Order.

When this court first considered this appeal, a fractured three-judge panel held that the complaint should have been dismissed in its entirety. A majority of the panel held that the act of state doctrine prevented the court from inquiring into the Marcoses' activities during the period in question. *Marcos*, 818 F.2d at 1489-90. Because a majority of the panel concluded that the act of state doctrine prevented the court from adjudicating any of the claims, the majority did not need to consider, and did not address, the issues of pendent jurisdiction.

Judge Hall, in a separate concurring opinion, concluded that there was additionally a lack of subject matter jurisdiction because no RICO claim had been well pleaded. *Id.* at 1490-91.

Judge Nelson dissented, disagreeing with the other judges as to the applicability of the act of state doctrine. The dissent argued persuasively that the majority's holding with respect to the act of state doctrine was inconsistent with existing Supreme Court and Ninth Circuit authority. *Id.* at 1492-95. We granted en banc review because of that inconsistency, which was the principal focus of the petition for rehearing and rehearing en banc filed by the Government of the Philippines.

RICO CLAIMS AND FEDERAL QUESTION JURISDICTION

In defense of the panel's decision that the complaint must be dismissed in its entirety, the Marcoses have focused upon Judge Hall's separate opinion that there was no well-pleaded RICO claim and hence no federal jurisdiction. *See id.* at 1490-91. The Marcoses have urged that in order to make out a claim under RICO, the complaint would have to allege that there was an adverse economic impact upon the United States by virtue of the defendants' conduct.

RICO, however, was aimed at the destructive effect of organized criminal activity on our society. Its provisions do not focus on any adverse effect of specific activity on the nation's GNP. Its history emphasizes the adverse consequences of organized crime on our democratic processes, our domestic security and our general welfare, including but not limited to the economic system. *See* RICO Statement of Findings and Purpose, Pub.L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin.News 1073. The Supreme Court has stated:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, . . . but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." . . . RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 497-98, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985); *see also Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) ("[t]he legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots").

What RICO does require is "a pattern of racketeering activity." 18 U.S.C. § 1962. By definition, "racketeering activity" necessitates a violation of one of our state or federal laws. 18 U.S.C. § 1961. Federal RICO jurisdiction thus attaches only to those activities that allegedly violate our domestic laws.

In this case, in Count One of the Complaint, the plaintiff alleges that the Marcoses engaged in mail and wire fraud, and importation of stolen property into the United States in violation of 18 U.S.C. §§ 1341, 1343, 2314, 2315. In engaging in these activities, the plaintiff alleges that

the Marcoses were conducting a RICO enterprise as part of an association in fact with the other defendants. These allegations, on their face at least, would survive a motion to dismiss for lack of subject matter jurisdiction. I therefore agree that there is a RICO basis for federal subject matter jurisdiction.

Finding a basis for federal question jurisdiction is but a first step, however, in reviewing the propriety of this injunction. The claims on which this injunction rests are pleaded as claims pendent to the RICO claims. The next step is thus to consider whether the relationship between the pendent claims and the federal claims are sufficiently close to permit the district court to assume jurisdiction over pendent claims reaching the Marcoses' worldwide holdings. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

THE INJUNCTION AND PENDENT JURSIDICTION

In holding that the district court had pendent jurisdiction over claims to the Marcoses' assets wherever located in the world, the majority fails to appreciate that pendent jurisdiction can derive only when there is a sufficient factual connection between the activities giving rise to the pendent claims and the activities giving rise to the federal claims. In this case, such pendent jurisdiction should properly derive only from activities directly related to the alleged RICO violations of United States law. These comprise the alleged fraudulent dealings in this country and illegal importation of assets into the United States. It is not enough to the majority to characterize all the claims as involving criminal misconduct. *See* majority op. at 1359-1360.

Plaintiff claims the assets now in the United States are traceable to thefts of assets rightfully belonging to the people of the Philippines. There may well be a sufficient factual nexus to sustain pendent jurisdiction for claims arising from the original wrongful appropriations of the

property now found in this country. This is because the property is the same. No such factual link as yet exists for the pendent claims to property transferred from the Philippines to other countries.

It is an elementary legal principle that federal courts are courts of limited jurisdiction. There are constitutional restraints on their exercise of jurisdiction. The Constitution restricts federal courts' jurisdiction to claims "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const., art. III, § 2. When a plaintiff pleads a federal claim within a district court's federal subject matter jurisdiction, a plaintiff may not automatically bring any other claim against the same defendant. Subject matter jurisdiction of non-federal claims, under the judicially-created doctrine of pendent jurisdiction, depends upon the relationship between those claims and the federal claims.

The Supreme Court initially set out the concept underlying pendent jurisdiction in 1824 in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824). There, the Court stated that

> when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of of congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

Id. at 823. The Court subsequently expanded the *Osborn* doctrine in *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 29 S.Ct. 451, 53 L.Ed 753 (1909), then narrowed pendent jurisdiction's scope in *Hurn v. Oursler*, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148 (1933). Finally, more than two decades ago, the Court clarified the scope of pendent jurisdiction in *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

In *Gibbs*, a unanimous Court rejected *Hurn* as "unnecessarily grudging," *id* at 725, 86 S.Ct. at 1138, and adopted a two-part test resting on considerations of power and discretion. In evaluating a federal court's power to hear a pendent claim, the Court stated that:

> [p]endent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. . . . The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judical proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

Id.

Thus, federal claims and pendent claims must all derive from a "common nucleus of operative fact." They must also be the sort that would ordinarily be tried in "one judicial proceeding." *Id.* The majority opinion does not analyze the pendent claims. Instead, it merely announces that the pendent claims arose from a nucleus of operative fact common to the RICO claims. Majority op. at 1359.

In reviewing the entry of the preliminary injunction, we should consider the nature of the asserted pendent jurisdiction and address the two jurisdictional issues that *Gibbs* requires courts to address when dealing with pendent claims.

The first question, therefore, is whether the RICO claims and all of the pendent claims arise from a "common nucleaus of operative fact." They do not. The RICO claims of necessity have to do with the defendants' activities that violated the criminal laws of the United States. The pendent claims are not limited to those activities and reach property that has not been shown to have any connection with the United States itself or violations of our law.

Upholding pendent jurisdiction in such circumstances is thus contrary to the teaching of decisions following *Gibbs* that have focused on the nexus between events underlying the federal cause of action and those underlying pendent state causes of action. *See, e.g., Finn v. Gunter*, 722 F.2d 711, 713 (11th Cir.1984) (finding pendent jurisdiction); *PAAC v. Rizzo*, 502 F.2d 306, 312-13 (3d Cir.1974), *cert. denied*, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d 804 (1975) (no pendent jurisdiction); *see also* C. Wright, A. Miller & E. Cooper, 13B *Federal Practice and Procedure* § 3567.1 (1984). Our circuit also evaluates pendent claims under the nexus test. *See, e.g., Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 231 (9th Cir.1975). The plaintiffs have provided us with no explanation of how the pendent claims are related to the RICO claims. The only factual connection between all the claims of wrongdoing in this case appears to be a common plaintiff and common defendants. Under *Gibbs* and the constitutional restraints on the exercise of power by the federal judiciary in Article III, that is not sufficient.

Moreover, even assuming there is a common nexus of fact reaching all the Marcoses' assets, pendent jurisdiction would exist only as to the claims that would ordinarily be tried in one judicial proceeding. *Gibbs*, 383 U.S. at 725, 86 S.Ct. at 1138. These are not such claims. The RICO claims allege violations of the United States' criminal laws through activities in this country. The

pendent claims, on the other hand, encompass allegations of fraud and conversion stemming from the Marcoses' actions in the Philippines spanning a twenty-year period. Further, the bulk of the property claimed, according to the complaint, is located in Switzerland. The claims against the Marcoses are in fact already the subject of multiple judicial proceedings. *See, e.g., Republic of the Philippines v. Marcos*, litigation in the Southern District of New York, 86 Civ. 2294 (PNL), and *Republic of the Philippines v. Marcos*, litigation in the District of Hawaii, No. CV-86-0155 HMF. The plaintiff cites no case remotely similar in scope to this case. The claims here are not those ordinarily tried in one judicial proceeding.

ACT OF STATE DOCTRINE

The majority of our three-judge panel concluded that the act of state doctrine bars consideration of the plaintiffs' claims. I agree with the majority of this en banc court that such a holding is not appropriate on this record. I do not agree with the majority, however, that this injunction can be affirmed without any regard to the act of state doctrine.

The panel majority's use of the act of state doctrine as a threshold bar in the circumstances of this case is not consistent with the development of that doctrine under Supreme Court authority. *See, e.g., Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). We have expressly stated that the act of state doctrine is not jurisdictional. *See International Association of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1359 (9th Cir.1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir.1976), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985). Rather, the doctrine involves the

judiciary's prudential decision to refrain from adjudicating the legality of a foreign sovereign's public acts that were committed within its own territory. *See OPEC*, 649 F.2d at 1359; *see also Sabbatino*, 376 U.S. at 401, 84 S.Ct. at 926. The Supreme Court, in addressing the act of state doctrine, has stated:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open the be availed of by sovereign powers as between themselves.

Sabbatino, 376 U.S. at 416, 84 S.Ct. at 934 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897)).

The act of state doctrine "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Sabbatino*, 376 U.S. at 423, 84 S.Ct. at 938. The Court further elaborated that the doctrine involves separation of powers:

> [The doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. . . . [S]ome aspects of international law touch much more sharply on national nerves that do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. . . . [W]e decide not only that the Judicial Branch will not examine the validity of a taking of property

> within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit.

Id. at 427-28, 84 S.Ct. at 940.

However, these considerations are less compelling in the situation before us, where the foreign government has itself invoked our jurisdiction, and the challenged actions involve a government no longer in power. In *Sabbatino*, the Supreme Court observed that, "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered." 376 U.S. at 428, 84 S.Ct. at 940. "Moreover, the act of state doctrine reflects respect for foreign states, so that when a state comes into our courts and asks that our courts scrutinize its actions, the justification for application of the doctrine may well be significantly weaker." *Republic of the Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir.1986).

Further, the Supreme Court has noted that for doctrine to apply the acts in question must have involved public acts of the sovereign. The Court stated that in each of its act of state decisions, the facts were sufficient to demonstrate that

> the conduct in question was the public act of those with authority to exercise sovereign powers and was entitled to respect in our courts. [H]ere, no statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.

Alfred Dunhill, 425 U.S. at 694-95, 96 S.Ct. at 1861.

Accordingly, the courts have insisted that the act of state doctrine precludes review of *public* acts of the *sovereign*. *See, e.g., Marcos*, 806 F.2d at 358 ("[t]hat the acts must be *public* acts of the *sovereign* has been repeatedly affirmed") (emhasis in original); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir.1980) ("we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state"); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 (5th Cir. 1980) ("[t]he act of state doctrine only precludes judicial inquiry into the legality, validity, and propriety of the acts and motivations of foreign sovereigns acting in their governmental roles within their own boundaries"); *Jiminez v. Aristeguieta*, 311 F.2d 547, 557 (5th Cir. 1962) ("judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality"); *Sharon v. Time, Inc.*, 599 F.Supp. 538, 544 (S.D. N.Y.1984) ("[t]he doctrine is limited to laws, decrees, decisions, seizures, and other officially authorized 'public acts'"); *see also Restatement (Second) of Foreign Relations Law* § 41 (1965) (doctrine involves refraining "for examining the validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interest").

As the dissenting opinion of Judge Nelson quite rightly pointed out, the act of state doctrine cannot bar the plaintiff's action at this stage in the proceedings due to the distinction between the official acts and the private conduct of a former head of state. As Judge Nelson stated:

> Marcos and his agents no doubt exercised broad power, especially after the imposition of martial law in 1972. But the appropriate inquiry is not to invoke the talismanic label "dictator." The district court should determine which of the challenged acts were official and which were not. Only by doing so can the

> court determine the extent to which the act of state doctrine may apply.

818 F.2d at 1494-95.

At this point, no determinations have been made regarding the capacity in which the Marcoses were acting when the alleged unlawful conduct occurred. Accordingly, the original panel majority erred in finding that, at this stage of the litigation, the act of state doctrine bars adjudication of the bulk of the Philippine government's pendent claims.

The majority decision here, however, goes much further. It declares that the injunction can be affirmed without regard to the act of state doctrine. In my view, we should instead instruct the district court to consider to what extent, if any, the doctrine applies in the circumstances of this case, and on the basis of the record which has developed more fully during the pendency of this interlocutory appeal. Until such consideration can be given, an injunction of this breadth is not appropriate.

This en banc court requested the amicus views of the Department of State on the act of state issues. Its brief concludes that the application of the act of state doctrine at this stage is speculative and the injunction premature. The majority's reliance upon the position of the United States as support for its holding is wholly misplaced. The government urges that an injunction should not have been entered on the basis of this record. The government amicus curiae brief states in appropriate context as follows:

> [T]he record before the district court, which did not include any detailed specification of the factual basis for the bulk of the nonfederal claims, did not make it possible even to analyze the extent to which those claims are properly before the court. . . .

> Even assuming jurisdiction, it is not clear at this stage that the district court should, as a prudential matter, undertake to adjudicate the bulk of the non-federal claims. The court's capacity to do so fairly and expeditiously and without offending the sensibility of other nations cannot be resolved on this record. Adjudication in this district court may turn out to be barred by considerations of international comity and *forum non conveniens*.
>
> The act of state doctrine seems to us to have little or no bearing on this case at this stage of its development. The doctrine provides, in general, that the validity of specific acts of a foreign sovereign is not subject to challenge in our courts; the circumstances of a particular case may, however, make that general principle inapplicable. On the present record, it is not clear that any act of state—an act of a sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty—is involved in this case. Nor is it clear that the case would require an adjudication of the validity of such an act, without which the case could not fairly proceed. Under these circumstances, the bearing, if any, of the act of state doctrine on this case should be determined only after further development of the case on the merits.

Amicus brief at 11-12.

The United States' views are wholly in accord with those expressed in this dissent and are in conflict with the majority.

CONCLUSION

This injunction is unprecedented in its breadth. To decide the merits of the pendent claims, the district court would have to unravel all of the Marcoses' financial transactions over a long period of time and over much of the globe. It would take a corps of historians years to accomplish the task. We are not yet told why a single district judge in California should undertake it.

I would vacate the injunction and remand the matter to the district court for further consideration of the appropriate scope of a preliminary injunction.

FLETCHER, Circuit Judge, concurring specially in Judge SCHROEDER's concurring and dissenting opinion:

I concur fully in the following portions of Judge Schroeder's opinion: its discussion of the basis for finding jurisdiction based on a well-pleaded RICO claim; its discussion of the basis for concluding that the act of state doctrine is not a prudential bar at this stage of the proceedings in this case.

I concur only in its conclusion that the injunction should be vacated and remanded for further consideration in that I do not agree with its restrictive view of pendent jurisdiction (by the same token, I cannot agree with the majority's expansive approach). Also, I would stay the vacation of the injunction for a reasonable period of time to allow the district court to reconsider the injunction and its scope in light of the current state of the record.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 86-6091, 86-6093

THE REPUBLIC OF THE PHILIPPINES,
Plaintiff/Appellee,

v.

FERDINAND E. MARCOS, IMELDA R. MARCOS, RAMON AZURIN, DIOSDADO C. ORDONEZ and ANCOR HOLDINGS, N.V.,
Defendants/Appellants.

Argued and Submitted Oct. 3, 1986

Decided June 4, 1987

As Amended June 24, 1987

Appeal from the United States District Court
for the Central District of California

Ronald L. Olson, Richard B. Kendall, Los Angeles, Cal., for plaintiff/appellee.

Gerald Walpin, Lawrence G. Golde, Dorothy Heyl, New York City, Richard A. Hibey, Washington, D.C., for defendants/appellants.

Before NELSON, HALL and KOZINSKI, Circuit Judges.

KOZINSKI, Circuit Judge.

We review a preliminary injunction entered against the former president of the Philippines, his wife, several of their associates, corporations allegedly controlled by some or all of them, and a bank where Mrs. Marcos has an account.

Facts

A. Background

On February 7, 1986, a special presidential election was held in the Philippines. There were allegations of massive fraud against the existing government and outbreaks of violence against those supporting the opposition. The precise vote count may never be known, but the official tabulation, which showed an overwhelming victory for Ferdinand Marcos, was rejected by the Philippine people. On February 25, 1986, realizing perhaps that his regime was nearing its end, Marcos and his wife left. His successor, President Corazon Aquino, was almost immediately recognized by our government as the legitimate leader of the Philippines. N.Y. Times, Feb. 26, 1986, at 1, col. 3.

When the Marcoses arrived in Hawaii, they brought along numerous crates filled with currency, jewels, precious metals and negotiable instruments. These crates were impounded by the United States Customs Service. Litigation began. On February 28, the Central Bank of the Philippines sued in the United States District Court for the District of Hawaii, seeking the return of 22 crates full of Philippine currency. On March 13, the Marcoses' agents petitioned for a writ of mandamus against the Commissioner of Customs, seeking the release of all the crates. On March 21, the Central Bank sued for the return of all the crates or their monetary equivalent. All these actions were consolidated in Hawaii. The mandamus suit against the Commissioner of Customs was decided, on an expedited basis, against the Commissioner,

then reversed by another panel of this court. *Azurin v. Von Raab*, 803 F.2d 993 (9th Cir. 1986).

Assets allegedly belonging to the Marcoses, or held for their benefit, began to turn up around the world. The Republic of the Philippines (the Republic) has begun litigation in Switzerland, state and federal courts in California, and federal courts in New York, New Jersey and Texas. In each case, the Republic is trying to recover or freeze specific assets that it regards as property of the Philippines improperly possessed or controlled by the Marcoses.

B. The Complaint

The complaint in this case was filed on June 16, 1986. Unlike the cases filed in other jurisdictions, *e.g.*, *Republic of the Philippines v. Marcos*, 806 F.2d 344, 361 (2d Cir. 1986), this one does not simply seek the recovery or freezing of specific property. Instead, it alleges that during his tenure as president of the Philippines, Marcos committed depredations that enabled him to gain enormous riches at the expense of the Republic and its citizens. Raising various federal and state law claims, the Republic seeks to have all or part of this wealth returned; it also seeks $50 billion in punitive damages.

The thrust of the Republic's claim is that the Marcoses abused their authority, depriving the Philippines and its people of wealth that is rightfully theirs. Paragraph 12 of the complaint charges that "Mr. Marcos used his position of power and authority to convert and cause to be converted, to his use and that of his friends, family, and associates, money, funds, and property belonging to the Philippines and its people." This allegation is incorporated into, and forms the basis of, every claim for relief in the complaint. In addition, plaintiff alleges as follows:

> [T]he Philippines existed as a sovereign government and thus constituted a RICO "enterprise" . . . . De-

fendants conducted or participated . . . in the conduct of the affairs of the Philippines through a pattern of racketeering activity . . . [Complaint ¶¶ 28, 29(a).]

Mr. Marcos represented on countless occasions to the Philippines and its people that he was governing and would govern fairly and honestly, pursuant to his oath of office and the Constitution and Laws of the Philippines. He further made numerous and frequent declarations to his people that he had never taken money, property, or funds belonging to the Philippines or its people for his own personal use, nor that of his friends, family and associates. [*Id.* ¶ 49.]

Mrs. Marcos [as Governor of Manila] made similar representations of honesty, integrity and willingness to act within and not above the laws to the people of the Philippines residing in Manila. [*Id.* ¶ 50.]

[The Marcoses] intended that the Philippines and its people rely on these misrepresentations and thereby permit Mr. and Mrs. Marcos to remain in power and positions of authority. [*Id.* ¶ 51.]

They further intended that the people of the Philippines would be deceived and not realize that Mr. and Mrs. Marcos, and their accomplices, family, and associates were plundering the wealth of the country to enrich themselves at the expense of the Philippines and its people. [*Id.*]

Plaintiff [the Republic] relied to its detriment on the representations of Mr. and Mrs. Marcos, and their accomplices, by permitting them to remain in positions of power and authority for twenty years and by allowing, through ignorance, the plunder of the country. [*Id.* at ¶ 52.]—Mr. Marcos as President, and Mrs. Marcos as Governor of Manila, occupied positions of trust and confidence as to the government and people of the Philippines. [*Id.* at ¶ 57.]

> Mr. and Mrs. Marcos breached that trust and confidence by committing numerous acts of fraud, deceit, conversion, civil conspiracy, acts of racketeering, and other unlawful acts [and that as a consequence thereof plaintiff] permitted them to remain in positions of power and to conduct the affairs of the Philippines virtually unchecked. [*Id.* ¶¶ 58-59.]
>
> Mr. and Mrs. Marcos, by virtue of their position [sic] as President of the Philippines and Governor of Manila, respectively, occupied positions of trust as to the Philippines and its people. [*Id.* ¶ 62.]
>
> [Before] Mr. Marcos assumed the office of President of the Philippines . . . he took the Oath of Office. . . . By accepting the duties and obligations imposed by the oath, in consideration for the remuneration . . . provided by Philippine law, Mr. Marcos entered into an implied contract with the Philippine government to use the power of the Presidency according to law, in good faith, and not for personal aggrandizement. [*Id.* ¶¶ 71-72.]

The complaint also alleges that during Marcos' rule, he and his wife converted and caused to be converted property worth $1.55 billion belonging to the Philippine government and its citizens. Most of this, approximately $1.5 billion, allegedly went into Swiss bank accounts; four million dollars went to buy a house in Beverly Hills; some $800,000 went into two bank accounts at Lloyds Bank in California; and property worth $7 million is in the Hawaii crates.

Only Ferdinand and Imelda Marcos are charged with having participated in all of these transactions. Defendants Ramon Azurin and Gregorio Araneta are alleged to have been the Marcoses' agents for bringing the crates of money and jewelry into Hawaii. Defendants Antonio Floriendo, Diosdado Ordonez, Calno Holdings N.V., Krodo Properties N.V., and Al Djebel Corp. (collectively the

"minor defendants") participated only in the acquisition and holding of the Beverly Hills property. Lloyds Bank was named as a defendant only because it held the two accounts in the name of Mrs. Marcos. There are no specific allegations of wrongdoing against Ancor Holdings, Inc.

On this foundation, the Republic strives to build eleven claims. Only the first three, based on the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1982), are grounded on federal law; the remainder are pendent. The first RICO claim charges the Marcoses and the minor defendants with conducting a RICO enterprise, consisting either of the Philippine government itself or, alternatively, of an association-in-fact made up of the defendants with an existence apart from the racketeering activity in which they allegedly engaged. The specific activities alleged are: (a) the transfer, by mail and wire, of converted funds, which the Republic claims amounted to mail or wire fraud; (b) the transportation of the crates to Hawaii, which the Republic claims was the knowing transportation of stolen goods in foreign commerce; (c) the acquisition of the Beverly Hills property by Calno (later transferred to Krodo and Al Djebel) with funds that the Republic claims were stolen, and so known to be by all the defendants involved; (d) the knowing concealment of stolen goods moved in foreign commerce; and (e) the sale of a deed of trust to the Beverly Hills property (part of Calno's disposition of the property) knowing that the deed was stolen or taken by fraud.

The second federal claim charges investments of funds produced by racketeering into two "enterprises": the Beverly Hills property and the Lloyds Bank accounts. The third claim alleges a conspiracy among the defendants to conduct the RICO enterprise and invest the funds.

The remainder of the complaint propounds various state law theories of recovery on the same allegations of

fact. They include, in particular, requests that the court impose a constructive trust on the disputed assets and require an accounting of the defendants.

C. District Court Proceedings

The Republic moved for a preliminary injunction to prevent the transfer of property held anywhere in the world by or on behalf of the Marcoses. On June 25, 1986, the district court granted the injunction. It held that RICO established a basis for federal jurisdiction and the pendent causes of action entitled the Republic to an injunction. The court based the preliminary injunction on the pendent claims for constructive trust and accounting, finding that the Republic had a substantial likelihood of prevailing. It also found that the Marcoses' alleged propensity to move assets would irreparably harm the Republic if the injunction were not granted. The Republic had made no attempt to win an attachment of any assets and the district court held that it was not required to do so.

Defendants appeal, raising four major contentions. First, they argue that the district court had no jurisdiction over this action. They contend that the RICO claims are so remote as to be frivolous. Second, they argue that even if plaintiff has made a colorable claim sufficient to establish subject matter jurisdiction, the district court abused its discretion by issuing the injunction. They argue that the plaintiff's case is just too weak, particularly when their likely affirmative defenses are considered, to support a finding that it will probably succeed on the merits. Third, defendants argue that the injunction was improvidently granted because the Republic will not sustain irreparable harm if the injunction is dissolved, the Marcoses having agreed to a freeze of their assets for the Republic to litigate the case in the Philippines. Finally, defendants contend that, in any case,

the injunction—covering the Marcoses' property worldwide—is far too broad, sweeping in a multiude of assets that have no connection to the pendent state law claims.

Discussion

A district court may grant a preliminary injunction when the movant demonstrates probable success on the merits and the possibility of irreparable injury. *San Diego Comm. Against Registration & the Draft v. Governing Bd.*, 790 F.2d 1471, 1473 n. 3 (9th Cir.1986). Where the balance of relative hardships "tips decidedly toward the plaintiff," however, "the plaintiff need not show as robust a likelihood of success on the merits." *Benda v. Grand Lodge of the Int'l Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir.1978), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). As often noted, preliminary injunctions may be issued at any point on a continuum along which the likelihood of success varies inversely with the potential of harm to the plaintiff. *Id.* In this case, the district court based its decision to grant a preliminary injunction on its conclusion that the Philippines had a substantial likelihood of success on both its RICO and pendent state claims, and that there was a "substantial danger" of irreparable harm. The court made no findings on the balance of relative hardships necessary to support an injunction at the opposite end of the spectrum.

The grant of a preliminary injunction may be reversed if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir.1984). Legal issues underlying the preliminary injunction decision are reviewed de novo. *International Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 799 F.2d 547, 551 (9th Cir.1986).

I.

SUBJECT MATTER JURISDICTION

The defendants contend that the Republic's RICO claims are so frivolous that they cannot form the basis of jurisdiction in the district court. But we view jurisdictional claims under an exceedingly generous standard at this stage of the proceedings. As we stated in *Kenistón v. Roberts*, 717 F.2d 1295, 1298 (9th Cir.1983), "the complaint must fulfill only two criteria: (1) it must 'claim a right to recover under the Constitution and laws of the United States,' and (2) the claim must not be 'wholly insubstantial and frivolous.' *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 21 n. 6 [102 S.Ct. 2202, 2206 n. 6, 72 L.Ed.2d 639] (1982) (*quoting Bell v. Hood*, 327 U.S. 678, 681, 682-83 [66 S.Ct. 773, 775, 776, 90 L.Ed. 939] (1946))."

While generous, this standard is not toothless. We regularly uphold the dismissal of claims where they are so insubstantial that the district court plainly lacks jurisdiction. *See, e.g., Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248 (9th Cir.1974). However, we deem claims insubstantial only where the law is clear or where a plaintiff has persistently failed to allege an essential element. Under this narrow standard, we cannot conclude that all the RICO claims made by plaintiff here are frivolous. The law is neither so clear, nor are the allegations of the complaint so patently and irremediably defective, that we can say with confidence that plaintiff has failed to establish a colorable basis for jurisdiction in the district court. Assuming the truth of the matters alleged in the complaint, as we must, we find all of the elements of a RICO violation: the existence of a criminal enterprise, Complaint ¶¶ 28, 29(b); the conduct of its affairs through a pattern of racketeering activity, *id.* ¶¶ 29(a), 29(c), 30; and injury caused thereby, ¶ 32. Plaintiff's complaint

seems to allege at least prima facie RICO violations by the Marcoses.[1]

Where, as here, plaintiff's claim is based upon transactions that take place fully or partly outside the United States, we must make one further inquiry: whether our law was meant to reach the conduct in question insofar as it is extraterritorial in nature. *See, e.g., SEC v. United Financial Group, Inc.*, 474 F.2d 354, 355 (9th Cir.1973); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 135 (9th Cir.1977). Here the alleged thefts by Mr. Marcos and his confederates took place in the Philippines and quite probably that conduct cannot be reached by U.S. law. However, plaintiff does not base its claim directly upon the alleged thefts in the Philippines. Its claim is based upon conduct that it charges took place in the United States: mail fraud and transportation of stolen property across international borders in violation of 18 U.S.C. §§ 1341, 1343, 2314, 2315.

Assuming that the property in question is in fact stolen, the charged acts—all of which took place within the United States—would clearly violate U.S. law. Again, assuming that the allegations of the complaint are true, the violations appear to be sufficient predicate acts under RICO. When all is said and done, it may well prove otherwise. But at this early stage of the proceedings, where predicate acts are alleged to have been committed within the United States, we cannot say that the district court was without jurisdiction to entertain plaintiff's RICO claims.

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[1] The minor defendants, in addition to being accused of participating in some of the specific instances of racketeering, are all charged with conspiracy to violate RICO. 18 U.S.C. § 1962(d). The complaint specifically alleges an agreement to violate the law and describes several alleged overt acts that furthered the conspiracy. There is thus a prima facie case sustaining jurisdiction over the minor defendants as well.

II.

PROBABILITY OF SUCCESS ON THE MERITS

A.

This is a highly unusual case. The current government of a friendly foreign nation is pursuing that nation's former ruler, seeking to litigate in our courts the legality of his actions during more than 20 years in office. While Mr. Marcos had the title of president he was, in the words of Rafael Fernando, the West Coast representative of the Philippine Commission on Good Government, "the dictator of the Government of the Philippines and personally controlled the said government." Declaration of Rafael Fernando in Support of Temporary Restraining Order and Order to Show Cause (Fernando) ¶ 7. During much of Mr. Marcos' tenure in office, he governed by decree under a regime of marital law. *Id.* As plaintiff alleges, during this time the Marcoses were able "to conduct the affairs of the Philippines virtually unchecked." Complaint ¶ 59.

A few of Marcos' alleged misdeeds, as charged in the complaint and the Fernando declaration, may amount to nothing more than common fraud or theft accomplished without the exercise of governmental authority. But the vast majority of the allegedly illegal acts are quite different in character; they are activities that Marcos could only have undertaken pursuant to his powers as President of the Philippines: expropriation of private property; creating public monopolies; "grant[ing] government favors, contracts, licenses, loans, and other public benefits." Fernando ¶ 8. In this regard, perhaps the most telling aspect of plaintiff's case is its first claim for relief. Plaintiff there alleges that "the Philippines existed as a sovereign government and thus constituted a RICO 'enterprise' within the meaning of 18 U.S.C. § 1961(4)" and that "[d]efendants conducted, or par-

ticipated directly or indirectly in the conduct of the affairs of the Philippines through a pattern of racketeering activity. . . ." Complaint ¶¶ 28, 29. Plaintiff is thus claiming that the Philippine government headed by Marcos was a criminal enterprise under U.S. law.[2]

Moreover, plaintiff presents issues that are different in character, not merely in degree, from the normal case brought under RICO and the various state causes of action. Thus, paragraph 72 of the Complaint puts squarely in issue the manner in which Mr. Marcos discharged his responsibilities as President of the Philippines. Citing the oath of office Mr. Marcos took in 1965, plaintiff charges that he "entered into an implied contract with the Philippine government to use the power of the Presidency according to law, in good faith, and not for personal aggrandizement." Paragraph 73 then charges that "Mr. Marcos breached this contract."

Paragraph 51 of the complaint charges that Mr. and Mrs. Marcos made numerous misrepresentations "to the Philippines and its people," with the result that they were allowed "to remain in power and positions of authority." Paragraph 52 charges that "[p]laintiff relied to its detriment on [these misrepresentations], by permitting them to remain in positions of power and authority for twenty years and by allowing, through ignorance, the plunder of the country." Mr. Fernando, in his declaration, charges that the "amounts purloined by Mr. Marcos are of such significance as to affect the general economic conditions of the Republic of the Philippines and its people." Fernando ¶ 8.

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[2] The Republic alleges in the alternative that the defendants, except Lloyds Bank, were part of an association in fact. But under either theory, the Republic alleges that the defendants conducted the affairs of the Philippines for their own benefit, and urges us to examine closely the conduct of that government in the past to decide the motivations for its actions.

Plaintiff's case is a ringing indictment of Mr. Marcos' conduct as President of the Philippines during his 20 years in office. As such, it challenges not merely individual misdeeds or indiscretions but the very way in which Mr. Marcos wielded governmental power, retained that power and ran the Philippine government. This raises a variety of serious and sensitive questions about the ability of our courts to adjudicate this issue, and the propriety of their doing so. In effect, we must consider whether our courts are the appropriate forum for adjudicating what appears to be at least in part a political dispute between the Philippines' current government and its former ruler.

B.

Our jurisdiction in this case is based solely on RICO, a statute that does not authorize the court to grant injunctive relief. *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir.1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 1336, 94 L.Ed.2d 187 (1987). Thus, as the district court properly recognized, if an injunction is to be issued at all, it must be on the basis of the pendent state claims. Nevertheless, probability of success on the RICO claims is not entirely irrelevant. The purpose of a preliminary injunction is to preserve the court's power to render meaningful relief after a trial on the merits. 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2947 (1973). If the federal claims are exceedingly weak, or subject to meritorious affirmative defenses, they are likely to succumb to a motion to dismiss or an early motion for summary judgment. In that event, the pendent state claims may well be subject to dismissal also. *See, e.g., Kelley v. IBEW*, 803 F.2d 516, 519 (9th Cir.1986); *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227-28 (9th Cir.1976), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977) (court may not reach out to decide state law

claims if court and litigants have not already spent considerable time and effort on the case).

For purposes of our discussion, we need not, however, differentiate between the state and federal causes of action because all of plaintiff's claims hinge on certain key allegations of the complaint. *See* pp. 1474-75, *supra*. Although these allegations are made in elaborate detail, they have one common nucleus: Plaintiff is claimng that the Marcoses (with the help of their confederates) acquired substantially all of their wealth illegally. Thus, in order to establish the requisite predicate acts in the United States for purposes of RICO—mail fraud, wire fraud, transportation of stolen property—plaintiff must be able to show that the assets in question were in fact stolen or that the transactions involving wire and the mails involved property to which neither the Marcoses nor their confederates were legally entitled. Similarly, to establish a constructive trust under California law, plaintiff must show that the property in question was gained by "fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act." Cal.Civ.Code § 2224 (West App.1987). To be entitled to an accounting, plaintiff must show that the defendants acquired the assets by fraud. *K. King & G. Shuler Corp. v. King*, 259 Cal.App.2d 383, 396, 66 Cal. Rptr. 330, 338 (1968). If plaintiff cannot show that the property was obtained illegally, all of its claims—state and federal—will fail.

While plaintiff has made sweeping allegations of illegality, it has not attempted to match particular illegal acts with specific property in California or elsewhere. Instead, plaintiff relies on what it calls a "net worth" analysis to show that virtually all of the Marcoses' wealth was acquired illegally. Plaintiff asserts that Marcos had a net worth of $60,000 in 1966, a year after taking office; it claims that he now has a net worth over $1.5 billion. In the meantime, Marcos earned (and declared on his tax returns) income of some $337,000 from his salary

as President of the Philippines. Plaintiff therefore argues that practically everything the Marcoses own must have been stolen and therefore belongs to the Philippines.

Plaintiff seeks to bolster this net worth analysis with the Fernando declaration. In his declaration, Mr. Fernando asserts that the Marcos presidency was marked by "widespread purloining of funds and properties which were and are the property of the Philippine government." Fernando ¶ 8. Describing the illegal activity, Mr. Fernando states:

> The said taking of Government properties was effected by a range of techniques, including but not limited to accepting payments, bribes, kickbacks, interests in business ventures, and other things of value in exchange for the grant of government favors, contracts, licenses, franchises, loans, and other public benefits; expropriating outright private property for the benefit of persons beholden to or fronting for Mr. Marcos, the said expropriation being at times effected by violence or the threat of violence or incarceration; arranging loans by the Philippine Government to private parties beholden to and fronting for Mr. Marcos; direct raiding of the public treasury; diverting loans, credits and advances from other governments intended for use by the Philippine Government; creating public monopolies placed in the hands of persons beholden to and fronting for Mr. Marcos. The said actions of the defendants were in violation of the laws of the Republic prohibiting malversation and corrupt practices.

Fernando ¶ 8. Mr. Ferando provides no direct evidence to support this litany of offenses; his only knowledge of these "facts" comes from "countless newpaper and first-hand accounts" relating them. *Id.*

In order to succeed under its "net worth" theory, plaintiff must show that tracing is unnecessary because prac-

tically *all* of the Marcoses' wealth was obtained illegally. Plaintiff's theory breaks down if Marcos can show that he acquired a substantial portion of his wealth legally or if the court is unable to adjudicate the legality or illegality of a substantial portion of Marcos' acquisitions. In that case, plaintiff would have the burden of linking up specific acts of illegality with specific property, something plaintiff has not attempted.

We note, without addressing them, defendants' numerous challenges to the sufficiency of plaintiff's prima facie case.[3] We turn instead to what we consider to be the heart of this case: plaintiff's assertion, and the district court's assumption, that all of the Marcoses' wealth must have been stolen. Specifically, we consider whether plaintiff's multitudinous claims of illegality can all be adjudicated by the district court or whether, as Marcos strenuously contends, they are subject to dismissal under the related act of state and political question doctrines. If we determine that a substantial portion of Marcos' conduct is likely to be shielded by one or both of these doctrines, plaintiff's net worth theory would collapse, and with it its probability of success on the merits, at least insofar as its case is now framed.

C.

In *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), the Court pronounced

[3] Defendants contend the Republic failed adequately to allege each element of its prima facie RICO case: the commission of predicate offenses, the existence of a criminal enterprise, and its operation through a pattern of racketeering activity. They also contend that the plaintiff failed to allege the agreement required for a charge of conspiracy, and that the defendants' investments in this country were not investments in an "enterprise."

Defendants also contend that the Republic insufficiently alleged the fiduciary duty necessary to a claim for accounting, and the misappropriation of funds necessary for the imposition of a constructive trust.

concisely the act of state doctrine: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *See also Hatch v. Baez*, 7 Hun. 596, 599 (N.Y.App.Div.1876) ("by the universal comity of nations and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory"). Although the doctrine has been modified in the intervening years, *Underhill* still expresses its essence as it is applied in our courts today.[4]

As the Court explained in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S.Ct. 923, 938, 11 L.Ed.2d 804 (1964), the doctrine has "'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." The doctrine, as developed by precedent, expresses a strong sense that in questioning the validity of foreign acts of state the judiciary may hinder this country's international diplomacy and "embarrass the United States in the eyes of the world." *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982).[5]

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[4] As late as 1964, the Court noted that "[n]one of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*." *Sabbatino*, 376 U.S. at 416, 84 S.Ct. at 934.

[5] The act of state doctrine applies with as much force to the state law claims as it does to those based on federal law. As the Court stated in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918): "The principle that the

Plaintiff's case implicates the act of state doctrine in its most fundamental sense. In order to resolve plaintiff's various claims against Marcos, the court will have to adjudicate whether Marcos' actions as President were lawful under Philippine law. A number of the acts plaintiff challenges are purely governmental ones, such as expropriation of property and creation of public monopolies. These were not merely the acts of Ferdinand Marcos, private citizen, while he happened to be president; they were an exercise of his authority as the country's head of state and, as such, were the sovereign acts of the Philippines. As the Second Circuit recently noted, to the extent that "Marcos's wealth was obtained through official expropriation decrees or public monopolies," they were public acts. *Marcos*, 806 F.2d at 359.[6]

Moreover, resolution of various issues raised by plaintiff could interfere with the conduct of foreign relations by the political branches of our government or otherwise entangle the judiciary in foreign affairs. Thus, it could well embarrass the United States for the court to hold, as plaintiff would have us do, that a foreign government that the United States recognized and considered its ally for many years, with which it entered into various treaties and otherwise had extensive dealings, was actually a criminal enterprise under our law. Also, this litigation may not be concluded for years. It is, therefore, difficult

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conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court . . . [as it is in cases] in which claims for damages were based upon acts done in a foreign country . . . ."

[6] The dissent points out, quite correctly, that the defendants bear the burden of proving that conduct is covered by the act of state doctrine. Nelson Dissent at 1495. However, we base our analysis on plaintiff's own characterization of defendants' acts, power and status. *See* p. 1479 *supra*. In gauging the likelihood of success on the merits, we simply adopt plaintiff's view as to what the evidence is likely to show.

to predict what effects the court's ruling will have on the political situation in the Philippines or on our relations with that country at that time. Our decision will be relatively innocuous only if it is in favor of the plaintiff, if our government's attitude toward the Philippines is unchanged and if the current Philippine government is still in power.

Plaintiff nevertheless advances a variety of arguments to the effect that this doctrine is not applicable. We consider each of its contentions in turn.

1. Plaintiff first argues that, in the words of the district judge, "the court is [not] going to be asked to decide anything about the affairs of the government of the Philippines. The question is what did Mr. Marcos do with the assets and the property and the money that he shouldn't have done." Trans. June 16, 1986, at 19, E.R. at 84. In support of this argument, plaintiff cites *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir.1984), *cert. denied*, 469 U.S. 1159, 105 S.Ct. 909, 83 L.Ed.2d 923 (1985); and *Sharon v. Time, Inc.*, 599 F.Supp. 538, 546 (S.D.N.Y.1985). Both cases were libel suits by official of foreign governments challenging news reports alleging that they had engaged in misconduct in the course of doing their jobs. Both officials denied committing the misconduct and the only question presented was whether they had in fact done so. In holding that the act of state doctrine was inapplicable, the *DeRoburt* and *Sharon* courts noted that validity of the acts was not at issue since everyone agreed that the acts, if committed, were illegal.[7] The cases therefore resolved themselves into a simple dispute about whether DeRoburt and Sharon in fact did what they were reported to have done. As the court noted

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[7] In *DeRoburt*, the act was the making of an illegal loan. 733 F.2d at 702. In *Sharon*, it was abetting the massacre of civilian refugees in West Beirut after the Israeli invasion of Lebanon. 599 F.Supp. at 542-43.

in *Sharon*, "[t]he issue in this litigation is not whether such acts are valid, but whether they occurred." 559 F.Supp. at 546.

Our case is quite different. At issue is not merely whether Marcos did what he is alleged to have done, but whether it was legal for him to do so as the country's dictator. Or, to put the matter somewhat differently, plaintiff cannot establish that the Marcoses obtained all of their wealth illegally without calling into question the legality of many of Mr. Marcos' acts as President of the Philippines. Unlike the *DeRoburt* and *Sharon* courts, the court here would have to pass on the validity of Mr. Marcos' acts, not merely determine whether he committed them.[8]

2. Plaintiff next argues that the act of state doctrine is inapplicable because Marcos' acts, to the extent they were illegal under Philippine law, were ultra vires and therefore not "*public* acts . . . [undertaken] in the exercise of *governmental* authority." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706, 96 S.Ct. 1854, 1867, 48 L.Ed.2d 301 (1976) (opinion of White, Powell and Rehnquist, JJ., and Burger, C.J.) (emphasis in original).[9] This argument proves too much. Since the

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[8] In *DeRoburt* our court clearly drew this distinction. We approved the dismissal of the third amended complaint involving plaintiff's claims that "defendant falsely accused the Republic of Nauru of secretly backing the separation of the Marshall Islands from Micronesia, [and] of making an illegal loan to the Marshall Islands in 1974, and falsely accused himself of making secret and illegal loans to the Marshall Islands in 1974 and 1978." 733 F.2d at 703. We held that "litigation of those claims would involve serious intrusion into the propriety of the acts and policies of a foreign state and thus clearly call into play the act of state doctrine." *Id.*

[9] Plaintiff also relies on a statement in *Sharon* to the effect that "a fairly stringent degree of formality may be required in proving [an officially authorized] act by a public official." 599 F.Supp. at 544. We reject this standard for three reasons. First, it was dictum.

[Continued]

act of state doctrine prohibits inquiry into the legality of official governmental acts, such acts surely cannot be official only if they are legal. This theory, if accepted, would emasculate the act of state doctrine.

In *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir.1940), the court rejected a similar request by a Spanish bank, backed by Spain's current government, seeking to set aside a transfer of silver bullion by an official of the country's prior government. Banco de Espana argued that the former Minister of Finance had been selling the silver in violation of Spanish law. The court refused to second-guess the legality of the Finance Minister's action, noting as follows:

> It should make no difference whether the foreign act is, under local law, partially or wholly, technically or fundamentally, illegal. No such distinction may be gleaned from the cases. So long as the act is the act

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[9] [Continued]

As discussed above, *Sharon* was simply not a case involving the validity of official acts; Judge Sofaer's ruminations as to how the doctrine would operate if it were applicable are interesting but beside the point. Second, the Second Circuit, in a recent opinion, has expressed skepticism about this portion of the *Sharon* opinion. Thus, recognizing that "*Dunhill* appears to require a certain amount of formality to indicate that the act is in fact the act of the sovereign," the Second Circuit noted that it is "probably not the degree of formality suggested by former Judge Sofaer in *Sharon*, 599 F.Supp. at 544-45." *Marcos*, 806 F.2d at 359. Finally, formality is required not as an end in itself, but to show that these were indeed governmental acts and not private ones. Even *Sharon* recognized that the requirement of formality is usually only applicable where an act of state is alleged "with respect to a subject not normally controlled by public acts." 599 F.Supp. at 544. Where the acts in question are inherently governmental—such as expropriation of private property or creation of public monopolies—the formality requirement serves no purpose. Such acts can only be effective if they were recognized and treated as official governmental acts. Here, Mr. Marcos could only have enriched himself by such acts if they were recognized and accepted as an exercise of his governmental authority.

> of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws.

Id., at 444. *See also Bernstein v. Van Heyghen Freres S.A.*, 163 F.2d 246, 249-50 (2d Cir.) (rejecting attack on Nazi confiscation based on failure to comply with German law), *cert. denied*, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 (1947).[10]

Plaintiff argues, however, that Mr. Marcos' actions were not the sovereign acts of the Philippines because they were not authorized by Philippine law. *Banco de Espana* rejected this very argument:

> [Banco de Espana] contends that the acts, if they took place, were unlawful under Spanish law, that under Spanish law an illegal act by a public officer strips him of his official cloak and makes his act a private one, and that such a "private" act cannot be

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[10] Similarly in *Hatch v. Baez* counsel argued that

> [i]t is only to the extent of his just and proper exercise of constitutional and legal powers that the president of Dominica [sic] is to be regarded as the executive of that republic. No unjust or oppressive act committed by his direction upon any one of his subjects, or upon others entitled to protection, is in any true sense the act of the executive in his public and representative capacity, but of the *man* simply, rated as other men are rated in private stations; for in the perpetration of unauthorized offenses of this nature, he divests himself of his "regal prerogatives," and descends to the level of those untitled offenders, against whose crimes it is the highest purpose of government to afford protection.

7 Hun. at 596-97 (emphasis in original) (citations omitted). The court flatly rejected this argument, noting as follows:

> The acts of the defendant for which he is sued were done by him in the exercise of that part of the sovereignty of St. Domingo which belongs to the executive department of that government. To make him amenable to a foreign jurisdiction for such acts, would be a direct assault upon the sovereignty and independence of his country.

Id., at 599.

> deemed governmental. But this is only a variation of the argument we have just rejected. By a "governmental act" is meant no more than a step physically taken by persons capable of exercising the sovereign authority of the foreign nation. The officials of the then-recognized Spanish government possessed such authority. If they purported to act in their official capacity, that physical fact precludes us from examining the validity of their acts under local law. The Spanish local law as a whole is of no concern to us, and it follows that we may not employ one doctrine of that law—that the illegal act of a public officer is deemed a private act—in order to gainsay the physical occurrence of an official act by an officer of the Spanish government.

114 F.2d at 444. *Cf. West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 828 (9th Cir. 1987) (court should, as a matter of comity, "presume that Mexican officials are acting in a manner consistent with the requirements of Mexican law").

As plaintiff admits, Mr. Marcos was the country's ruler for some two decades. He clearly was "capable of exercising the sovereign authority" of the Philippines during that time. In *Underhill v. Hernandez*, the Court noted that the act of state doctrine "[cannot] be confined to lawful or recogized governments. . . . The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of government ruling by paramount force as a matter of fact." 168 U.S. at 252, 18 S.Ct. at 84.[11] This

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[11] The court seemed to go even farther, suggesting that even a putative revolutionary government that failed to gain control of the country would be entitled to protection from liability for actions taken in pursuit of the revolution. 168 U.S. at 252-53, 18 S.Ct. at 84-85.

would seem to apply a fortiori to Mr. Marcos, who was the recognized head of the Philippine government throughout the relevant period. *See DeRoburt*, 733 F.2d at 703 (approving dismissal of third amended complaint because allegations, inter alia, that defendant falsely accused the president of Nauru of making secret and illegal loans to the Marshall Islands "clearly call into play the acts [sic] of state doctrine"); *West*, 807 F.2d at 828 ("[t]he public capacity of the actors involved . . . may serve to trigger the act of state doctrine").

3. Plaintiff advances the somewhat related argument that the act of state doctrine does not apply because the acts in question were not in the "public interests" of the Philippines, having been undertaken by Mr. Marcos for venal, immoral or selfish purposes. The dissent agrees with plaintiff, apparently arguing that acts done by an official "for his own private personal gain" are unofficial acts which may be scrutinized by this court.[12] Nelson Dissent at 1492-93.

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[12] The dissent relies upon the Fifth Circuit's decision in *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914, 83 St.Ct. 1302, 10 L.Ed.2d 415 (1963), as support for its contention that official acts of a former dictator do not include acts done for personal gain. Nelson Dissent at 1493-94. Although the alleged misdeeds of Jimenez and Marcos are similar in nature, the contexts in which judicial review is sought are very different.

In *Jimenez*, the Government of Venezuela sought the return to Venezuela of its former dictator pursuant to its Treaty of Extradition with the United States. 311 F.2d at 550-51. The Fifth Circuit held that the act of state doctrine did not bar the court, in habeas corpus review of extradition proceedings, from determining whether there was probable cause of guilt such that extradition to Venezuela was proper. *Id.*, at 557. The court relied on the fact that the political branches had, pursuant to a treaty, expressly contemplated judicial review of the official's actions. *Id.*, at 558. The act of state doctrine is clearly not a bar under such circumstances. *See Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940 (act of state doctrine does not bar inquiry into validity of sovereign act where there is a treaty defining controlling international law). Here, there is no treaty directing the court to act.

Of course, not everything a public official does is an official act; to the extent Mr. Marcos engaged in actions as a private citizen, he is subject to suit like anyone else. *See DeRoburt*, 733 F.2d at 704. Thus, if he entered the public treasury at gunpoint and walked out with money or property belonging to the Philippines, he would not be protected by the act of state doctrine. However, if he gained access to the public monies by statute, decree, resolution, order, or some other "governmental act" as president, the act of state doctrine would be triggered. *See Dunhill*, 425 U.S. at 693-95, 96 S.Ct. at 1860-61; *West*, 807 F.2d at 828; Restatement of Foreign Relations Law of the United States § 469, note 3 (Tent.Draft No. 7, 1986).

Once the acts in question are identified as governmental in character, our courts have uniformly refused to question the integrity or nobility of the reasons underlying them. *See, e.g., Clayco Petrol. Corp. v. Occidental Petrol. Corp.*, 712 F.2d 404, 407 (9th Cir.1983) (refusal to inquire whether foreign government's award of oil concession motivated by bribery), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984). "[S]uch inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert." *Occidental Petrol. Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 110 (C.D.Cal.1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972), *quoted with approval in Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 156, 78 L.Ed.2d 144 (1983).

The governmental acts of a country's chief executive necessarily reflect complex political and policy choices. That one of the motives behind a particular governmental act may have been selfish, or that it was intended to serve otherwise improper ends, does not make that act any less

a pronouncement of the sovereign or render it any less entitled to respect as such from other government. *See West*, 807 F.2d at 828; Restatement § 469, comment 7. It would greatly weaken the act of state doctrine if parties could put in question the validity of official government acts simply by attacking the motives of the government official who undertake them.

4. Plaintiff next advances the argument that, whatever force the act of state doctrine may have when it is invoked by the government or the country whose actions are questioned, it has little or no force here, where it is the Philippines itself that is asking us to look into the actions of its former dictator.[13] The acquiescence of the country's current government, and the fact that the actions in question were taken by a government no longer in power, do have a bearing on the application of the act of state doctrine. In *Sabbatino*, the Supreme Court hinted that this might be a relevant consideration, 376 U.S. at 428, 84 S.Ct. at 940, and one other court has so intimated. *See Marcos*, 806 F.2d at 359.

There is some reason for this. Where the country's current government seeks an adjudication of these matters, there is obviously less of a possibility that our pronouncements will embarrass our relations with that government.[14] But, just as the position of our own executive

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[13] Plaintiff also appears to be arguing that Marcos is not protected by the act of state doctrine because he is no longer president. The court in *Hatch* answered a similar argument as follows:

> The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government.

7 Hun. at 600. We agree.

[14] We say "less of a possibility" rather than "no possibility" because, even as things stand, a judicial pronouncement on some of the issues presented could raise foreign relations concerns. For

branch is not dispositive on the issue, *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762, 92 S.Ct. 1808, 1810-11, 32 L.Ed.2d 466 (1972); *Marcos*, 806 F.2d at 358, so can we not give dispositive effect to the pronouncement of a foreign sovereign, particularly one with a stake in the current litigation. *Banco de Espana*, 114 F.2d at 444. Embarrassment of our relationship with a foreign government is, after all, only one reason underlying the act of state doctrine. As the court stated in *Sabbatino*, there are others. 376 U.S. at 427-37, 84 S.Ct. at 940-45. While the acquiescence—indeed anxious invitation—of the current Philippine government allays one concern, it heightens others, making us leery of judicial involvement in this dispute.

We cannot shut our eyes to the political realities that give rise to this litigation, nor to the potential effects of its conduct and resolution. Mr. Marcos and President Aquino represent only two of the competing political factions engaged in a struggle for control of the Philippines.[15] While the struggle seems to be resolving itself in favor of President Aquino, this may not be the end of the matter.[16] Only four years ago, the tables were turned, with Mr. Marcos in power and Mrs. Aquino and her husband in exile in the United States. While we are

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example, we wonder how the current Philippine government would react to a pronouncement by the court of the United States that Mr. Marcos' actions were entirely legal and proper. Of course, plaintiff hopes to prove otherwise, but in assessing whether the act of state doctrine is implicated, we cannot prejudge the outcome of the dispute. Nor can we necessarily assume that the current government will be in power when the case is finally resolved. *See* p. 1486 & n. 16, *infra*.

[15] *See, e.g., Woman of the Year*, Time, Jan. 5, 1987 at 18-33; Wall St.J., Dec. 29, 1986, at 1, col. 3; N.Y. Times, Dec. 24, 1986, at 7, col. 4.

[16] In January, for example, some troops of the Philippine Army attempted a putsch with the Marcoses' apparent support. N.Y. Times, Jan. 30, 1987, at 1, col. 1.

in no position to judge these things, we cannot rule out the possibility that the pendulum will swing again, or that some third force will prevail. What we can say with some certainty is that a pronouncement by our courts along the lines suggested by plaintiff would have a substantial effect on what may be a delicate political balance, as would a contrary pronouncement exonerating Mr. Marcos.

Moreover, litigation proceeds at its own pace and the answer, whatever it may be, may well come at a time most inopportune from the point of view of our foreign policy as it is then conceived.[17] Judicial pronouncements that can have such effects surely implicate "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Sabbatino*, 376 U.S. at 427-28, 84 S.Ct. at 940. Absent express encouragement from the political branches of our government,[18] *see, e.g., Jiminez*, 311 F.2d

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[17] As this court stated in *International Ass'n of Machinists*, 649 F.2d at 1358, the judiciary must focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarass the United States in the eyes of the world.

[18] This was the crux of the Court's holding in *Sabbatino*:

> [R]ather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, *in the absence of a treaty or other unambiguous agreement regarding controlling legal principles*, even if the complaint alleges that the taking violates customary international law.

376 U.S. at 428, 84 S.Ct. at 940 (emphasis added).

at 558, we are reluctant to embark upon such an endeavor. As the Second Circuit recognized with respect to this controversy, "the plaintiff's claims necessarily require determinations that will directly and significantly affect American foreign relations." *Marcos*, 806 F.2d at 352.

The dissent argues that we may not consider the foreign relations consequences of this litigation because "the executive branch has clearly spoken on the question of potential embarrassment to the United States." Nelson Dissent at 1496. This assertion is based on statements made by the Second Circuit in *Marcos*, noting that the government had filed a statement supporting jurisdiction in that case, as well as in a case before the Court of International Trade. *See Marcos*, 806 F.2d at 356-57, 357 n. 3. The dissent deduces that the executive branch would take the same position in all other cases between the Philippines and the Marcoses, including ours. We are reluctant to accept this generalization.

In the first place, we do not know precisely what the executive branch said in those cases, nor the rationale for its position. No documents were filed by the State Department in our case and we do not have copies of those filed elsewhere. All we know about the State Department's position comes from the opinion of the Second Circuit. We find that characterization far too nebulous to permit sweeping inferences about the position of the executive branch. Other than emphasizing the importance of our relations with the Philippines, the Declaration of Undersecretary of State Armacost "refers to the establishment of the official Presidential Commission on Good Government headed by former Philippine Senator Jovito Salonga and to the United States' agreement to receive Senator Salonga at a diplomatic level." *Id.* at 357 n. 3. The Second Circuit then concludes: "Undersecretary Armacost asserted that the Aquino government will view *the United States' actions on this matter* as an important indicator of the future course of our bilateral relations

and stated that it is in the foreign policy interests of the United States to honor the *Philippine government's requests* at the earliest possible time." 806 F.2d at 357 n. 3 (emphasis added). Since the Armacost Declaration was not addressing the Second Circuit litigation but a case before the Court of International Trade, we find it impossible to deduce what "matter" Undersecretary Armacost refers to and what action is expected of the United States. Equally ambiguous is the reference to the "Philippine government's requests" mentioned by Armacost. Since we do not know the context in which the Armacost declaration was filed, we have no way of knowing what Armacost was referring to. His mention of the Philippine Commission on Good Government gives us a hint, however. In the papers filed before us is a copy of one of President Aquino's executive orders which sets forth the charter of that commission:

> The Commission on Good Government is hereby authorized *to request* and appeal to *foreign countries wherein any such assets or properties may be found to freeze them* and otherwise prevent their transfer, conveyance, encumbrance, concealment or liquidation by former President Ferdinand E. Marcos and Mrs. Imelda Romualdez Marcos, their close relatives, subordinates, business associates, dummies, agents, or nominees, *pending the outcome of appropriate proceedings in the Philippines* to determine whether such assets or properties were acquired by such persons through improper or illegal use of funds belonging to the Government of the Philippines or any of its branches, instrumentalities, enterprises, banks, or financial institutions or by taking undue advantage of their office, authority, influence, connections or relationship.

President of the Philippines, Exec.Order No. 2 at 3 (March 12, 1986) (emphasis added). We assume that the requests to which Mr. Armacost refers are those mentioned in the commission's charter, namely for foreign

governments to freeze assets of the Marcoses while the matter of ownership is litigated in the Philippines. That is precisely what happened in the Second Circuit.[19]

The Second Circuit case is materially different from ours in ways that are highly relevant to the application of the act of state doctrine. *See* n. 25 *infra*. Most significant, in that case "the district court will not be asked to try the basic issues accusing President Marcos of unlawful takings," 806 F.2d at 361, since such matters are to be determined in the Philippines. In our case, these matters would be litigated here.[20]

5. Finally, we consider it significant that such law as there may be to apply in determining whether Marcos' actions were legal is that of a foreign nation. As the Court noted in *Sabbatino*, "[a]n inquiry by United States

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[19] Equally unhelpful is the executive branch's pronouncement in *Marcos* itself. The most the Second Circuit was able to say about that statement is that "[*b*]*y implication* [the Justice Department] position carries with it the proposition that the United States does not consider this suit to be an improper intrusion on its management of foreign affairs." *Id.*, at 357 (emphasis added, footnote omitted).

[20] If an inference is to be drawn from the State Department's pronouncements, it would be from its failure to speak in this case while it did in two others involving the same parties and somewhat related issues. But it is a highly sensitive and delicate undertaking to deduce our State Department's attitude from what it has failed to say. As the Court noted in *Sabbatino*, "[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be important diplomatically." 376 U.S. at 436, 84 S.Ct. at 944. It suffices to conclude that we are not precluded from addressing this issue by what the executive branch has said and done in other cases.

In any event, we doubt that a State Department pronouncement even in this case would materially change our analysis. While embarrassment of foreign relations is a matter we consider, it is a relatively minor consideration in light of the other serious issues raised by plaintiff's case.

courts into the validity of an act of an official of a foreign state under the law of that state would . . . be exceedingly difficult. . . ." 376 U.S. at 415 n. 17, 84 S.Ct. at 933 n. 17. Moreover, it is not the Philippines' private law we would be interpreting, but important aspects of its public law. The question of whether Mr. Marcos properly invoked martial law, or whether he exercised it properly, if it has an answer in Philippine law at all, is no doubt of considerable importance and sensitivity to that country and its people. So is Mr. Marcos' invocation of presidential immunity under Article VII, Section 17 of the Philippine Constitution in force at the time Mr. Marcos was president,[21] a provision that, apparently, has been carried forward into the current constitution. Were we to answer this latter question, it would be as if *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), defining the immunity of American presidents, had been decided by the Supreme Court of the Philippines. As *Sabbatino* noted, such a determination "if wrongly made, would be likely to be highly offensive to the state in question." 376 U.S. at 415 n. 17, 84 S.Ct. at 933 n. 17.

D.

In *International Association of Machinists*, we noted that "[t]he act of state doctrine is similar to the political question doctrine in domestic law." 649 F.2d at 1358; *see also Sharon*, 599 F.Supp. at 547. Questions that appear to implicate one doctrine are sometimes best resolved by reference to the other. *See, e.g., Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum,*

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[21] This section provides:

> The President shall be immune from suit during his tenure. Thereafter, no suit whatsoever shall lie for official acts done by him or by others pursuant to his specific orders during his tenure.
>
> The immunities herein provided shall apply to the incumbent President referred to in Article XVII of this Constitution.

577 F.2d 1196, 1201 (5th Cir.1978), *cert. denied*, 442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 296 (1979).

Thus, even if we put to one side the foreign affairs implications of any decision an American court may reach on the merits, and even if our own political branches were to pronounce their willingness for us to hear the case, we would still be faced with the intractable problem of adjudicating the essentially political questions raised by plaintiff's complaint.

These problems lie at the very heart of the Republic's case. Plaintiff asserts that "[o]n September 21, 1972 [Mr. Marcos] declared martial law. From and after the declaration of martial law, Mr. Marcos was the dictator of the Government of the Philippines and personally controlled the said government." Fernando ¶ 7. In adjudicating plaintiff's claims, our courts would have to determine the legality of the actions of a foreign head of state, exercising dictatorial powers under a reign of martial law. It is hard to imagine what judicially manageable standards the courts could apply in making such a determination. A dictator is a ruler holding absolute authority; he is generally subject to no legal constraints, only physical and political ones.[22] Martial law constitutes the suspension of civil authority and invocation of rule by decree of a military commander.[23]

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[22] The American Heritage Dictionary (New Coll.Ed. 1976), defines dictator as "[a] ruler having absolute authority and supreme jurisdiction over the government of a state; especially, one who is considered tryannical or oppressive." *Id.*, at 366. Black's Law Dictionary (5th ed. 1979) defines a dictator as "[o]ne in whom supreme authority in any line is invested, one who rules autocratically, and one who prescribes for others authoritatively, and [often] oppressively." *Id.*, at 409 (citing *Houston Printing Co. v. Hunter*, 105 S.W.2d 312, 317 (Tex.Ct.Civ.App. 1937)).

[23] Black's Law Dictionary defines martial law as follows:

> A system of law, obtaining only in time of actual war and growing out of the exigencies thereof, arbitrary in its character,

If, in adjudicating this dispute, the court were to accept plaintiff's characterization, it is difficult to see what law to apply to Mr. Marcos' actions. By its nature, dictatorial rule is arbitrary and unrestrained by legal authority; martial law is a suspension of the normal rule of law. Offensive as such absolute government may be to our sense of justice, no legal restraints can prevail against dictatorial power. A dictator can do whatever he can get away with. A court of law in this country simply cannot second-guess how that power is exercised. *See Underhill*, 168 U.S. at 254, 18 S.Ct. at 85.

Plaintiff is in no better position if it seeks to challenge Mr. Marcos' invocation of martial law and assumption of dictatorial power. Again, there are no judicially manageable standards for us to apply in second-guessing that decision. Just as we cannot second-guess the outcome of an election, or the success of a revolution in a foreign country, *see id.* at 252-53, 18 S.Ct. at 84-85, so can we not adjudicate whether Mr. Marcos was within his rights in asserting dictatorial control over the Philippines starting in 1972.

We must take as given that Mr. Marcos was the country's president, that he was recognized as its head of state by our government,[24] *Oetjen v. Central Leather*

> and depending only on the will of the commander of an army, which is established and administered in a place or district of hostile territory held in belligerent possession, or, sometimes, in places occupied or pervaded by insurgents or mobs, and which suspends all existing civil laws, as well as the civil authority and the ordinary administration of justice.

Id. at 878-79. Webster's Third International Dictionary defines the term as "military rule exercised by a nation or state over its citizens or subjects in a situation where they are not legally enemies and when an emergency justifies such action." *Id.* at 1386.

[24] *See* 1975 Dig.U.S.Prac.Int'l L. 344-45 & n.1 (noting that Marcos had been granted head of state immunity in a libel action; "a Head of State performs important functions which should not be interfered with by the necessity of defending litigation in foreign countries").

Co., 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918), and that, as plaintiff so bluntly admits, he and his wife were "permitted . . . to remain in positions of power and to conduct the affairs of the Philippines virtually unchecked." Complaint ¶ 59. Whether the Philippine people so permitted the Marcoses to rule them out of ignorance, because they were misled, because they considered it to be in their self-interest, or because they were powerless to do otherwise, is something we do not know and have no way of finding out. It is simply beyond the capacity of our courts to adjudicate.

E.

In light of these considerations, we hold that the district court erred in concluding that plaintiff is likely to succeed on the merits of its state claims, or its federal claims for that matter. To succeed under those claims as they are now presented, plaintiff would have to establish that practically all of Mr. Marcos' wealth was stolen. In light of plaintiff's own claims and assertions, we believe that it will be unable to do so because, as to many of the assets in question, adjudication will be barred by the act of state doctrine, the political question doctrine or both. Since plaintiff has not sought to trace specific assets to specific alleged misdeeds, the exclusion of large portions of Mr. Marcos' wealth from adjudication will defeat plaintiff's net worth analysis, and with it, its case. In these circumstances, we cannot even say that the Republic has the "fair chance of success on the merits" needed to remand for a balancing of the hardships. *See Benda*, 584 F.2d at 315.[25]

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[25] While our dissenting colleague relies heavily on language drawn from the Second Circuit's opinion in *Marcos*, we view our approach as consistent with that of the Second Circuit. In that case, the court asserted jurisdiction over a claim by the Philippines for a very limited purpose: to "freeze [Marcos'] property in the United States subject to future process in [the Philippines]." 806 F.2d at 354. It would therefore be the Philippine courts that would decide

Conclusion

The order granting the preliminary injunction is reversed and the preliminary injunction is ordered vacated. The case is remanded to the district court for proceedings consistent with this opinion. To avoid duplication of effort, the panel retains jurisdiction over any further appeals in this case.

CYNTHIA HOLCOMB HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in the result reached in Judge Kozinski's opinion. Indeed, if the district court had had jurisdiction to enter the preliminary injunction, I could agree with it entirely. I respectfully dissent, however, from the jurisdictional holding of Part I of the opinion and join in the remainder.

The majority, in finding that the district court had jurisdiction, relies on the case of *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir.1983), for the proposition that at this stage of the proceedings the complaint must meet

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whether Marcos' conduct amounted to theft under Philippine law. *Id.* at 361. Moreover, the claims in that case covered only specific "assets in New York." *Id.* In short, the Second Circuit case was "merely ancillary to an eventual Philippine decree or judgment and was brought in the Southern District only because the real estate is located [t]here." *Id.* The Second Circuit contrasted the case of *Islamic Republic of Iran v. Pahlavi*, 94 A.D.2d 374, 464 N.Y.S.2d 487 (1983), *aff'd*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), *cert. denied*, 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778 (1985), where plaintiff sought to impose a constructive trust "on assets of the defendants throughout the world." *Id.* 94 A.D.2d at 377, 464 N.Y.S.2d at 490. Our case is far more analogous to *Islamic Republic*.

Quite significant, and unaddressed by the dissent, is the Second Circuit's recognition that to the extent "Marcos's wealth was obtained through official expropriation decrees or public monopolies" they were public acts, potentially subject to the act of state doctrine. 806 F.2d at 359.

only two criteria. First, it must claim a right to recover under the Constitution and laws of the United States. *Id.*, at 1298. Second, the claim set forth in the complaint must not be wholly insubstantial and frivolous. *Id.* The test set forth in *Keniston*, however, is used only " 'for the purposes of determining whether [the plaintiff] stated a cause of action on which relief could be granted.' " *Id.* (quoting *Jackson Transit Authority v. Local Division 1285*, 457 U.S. 15, 21 n. 6, 102 S.Ct. 2202, 2206 n. 6, 72 L.Ed.2d 639 (1982)). The test of whether to grant a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is inapplicable to the question of whether a plaintiff has made a sufficient showing of subject matter jurisdiction to obtain a preliminary injunction. At the preliminary injunction stage, a more stringent test applies.

In *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir.1973), a case both procedurally and factually similar to this one, we addressed the question of whether the district court had subject matter jurisdiction to enter a preliminary injunction. The SEC claimed that the defendants were violating United States securities laws. The district court entered a preliminary injunction in favor of the SEC. On appeal, the defendants argued that all offers and sales of shares were confined to foreigners and, therefore, that the district court did not have subject matter jurisdiction to grant the preliminary injunction. *Id.*, at 356. In reviewing the defendants' claim, this court did not apply the frivolity standard set forth in *Keniston*. Instead, we engaged in a thorough evaluation of the *effect* that the defendants' activities had had upon investors in the United States holding that "focus should be upon appellants' activities within the United States and the impact of those activities upon American investors." *Id.*, at 356-57. *See also Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 134 (9th Cir.1977) (focus in determining whether United States securities laws apply to foreign transactions should be on adverse impact of the

transactions on American securities markets); *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F.Supp. 1102, 1105 n. 3 (S.D.N.Y.1984) (focus in determining whether United States antitrust laws apply to international business transactions is on the situs of the effect).

The "effects" test applied in securities and antitrust cases should also be applied in RICO cases. When it passed RICO, Congress was concerned with the harmful effect of organized crime on the economy of the United States:

> The Congress finds that (1) organized crime *in the United States* is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from *America's* economy . . . (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt *our* democratic processes; (4) organized crime activities *in the United States* weaken the stability of *the Nation's economic system*, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of *the Nation* and its citizens . . .

RICO Statement of Findings and Purpose, Pub.L. No. 91-452, 84 Stat. 922 (1970), 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin.News 1073, 1073 (emphasis added). *See also United States v. Bagnariol*, 665 F.2d 877, 892 (9th Cir.1981) (effect on commerce is an essential element of a RICO violation), *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982). Thus, in order to maintain a lawsuit under RICO, a plaintiff must demonstrate that the transactions in question adversely affected the economy of the United States.

The complaint before us in this case fails to make the requisite allegations of harm to the economy of the United States;[1] the majority does not hold otherwise. Rather than arguing that the "effects" test is met on the facts of this case, the majority erroneously applies a "conduct" test utilized in the securities law setting. *See Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424-25 (9th Cir.1983) (where conduct in the United States was significant with respect to the alleged violation, there is federal jurisdiction under United States securities laws). The "conduct" test used in the securities context is not applicable in RICO cases. *Cf. United States v. Bagnariol*, 665 F.2d 877, 892 (9th Cir.1981) (effect on commerce is an essential element of a RICO violation), *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982). In passing RICO, Congress was concerned with the *effect* of organized crime on the economy of the United States. Therefore, the "effects" test is the only applicable one. Even if the majority were correct in its assumption that the "conduct" test applies in the RICO context, the test would not be met on the facts of this case. The defendants' conduct in the United States was not a significant element of the harm alleged by the plaintiff. *See, e.g., Grunenthal*, 712 F.2d at 425. As the plaintiff conceded at oral argument, the investment of funds in the United States was no more injurious to the Philippines than if the funds had been kept in a mattress in the Philippines.

I would vacate the injunction on the ground that the district court lacked subject matter jurisdiction to enter it.

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[1] At oral argument, we were advised that the plaintiff had amended its complaint subsequent to the issuance of the preliminary injunction. The propriety of a preliminary injunction under the amended complaint is not before us.

NELSON, Circuit Judge, dissenting:

The majority opinion characterizes this case largely as a political dispute between competing governments, designed to challenge the legitimacy of Marcos' reign. Majority op. at 1475, 1479, 1479-80. This characterization distorts the proper focus of our analysis. In my view, this appeal concerns the attempt by the Republic of the Philippines to secure a preliminary injunction to prevent Ferdinand and Imelda Marcos, and their alleged agents, from transferring, conveying, or encumbering specific properties in California, and other as yet unidentified properties, allegedly purchased with funds stolen from the Republic of the Philippines, pending a final determination of ownership of the properties. The district court concluded that it had subject matter jurisdiction under RICO. Under the pendent claims for conversion, fraud, and deceit, which sought money damages, an accounting, and return of property under a constructive trust,[1] the court issued a preliminary injunction to preserve the status quo pending a determination on the merits. Because I believe that the act of state doctrine does not compel reversal, and that the district court clearly did not abuse its discretion in issuing the preliminary injunction, I respectfully but strenuously dissent from the majority's result and all except part I of

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[1] The Philippines' verified complaint includes among its allegations of private unlawful conduct:

—that Ferdinand Marcos "converted, to his use and that of his friends, family, and associates, money, funds, and property belonging to the Philippines and its people." Complaint ¶ 12.

—that the Marcoses committed "numerous acts of fraud, deceit, conversion, civil conspiracy, acts of racketeering, and other unlawful acts." *Id.* ¶ 58.

—that the Marcoses stole and transported in their flight from the Philippines to Hawaii approximately $7 million belonging to the Philippine people, including currency, negotiable instruments, and transportable property. *Id.* ¶¶ 25-26.

the majority opinion, which upholds the finding of subject matter jurisdiction under the federal claims.[2]

I. THE ACT OF STATE DOCTRINE

The majority would reverse the decision to issue the preliminary injunction because it believes that the act of state doctrine renders the Philippines' likelihood of success on the merits low. I believe that the majority's analysis of the act of state doctrine is incorrect in substantial part as a matter of law and wholly unsupported by the facts and procedural posture of this case. Below I set forth the principal points on which I disagree with the majority's analysis.

A. *The Scope of the Doctrine: Official and Unofficial Acts*

Under the act of state doctrine, the courts of this country will not inquire into the legality of official acts of sovereign nations done within their own territories. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n.7, 96 S.Ct. 1854, 1859 n.7, 48 L.Ed.2d 301 (1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763, 92 S.Ct. 1808, 1811, 32 L.Ed.2d 466 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964). The doctrine applies to "the public and governmental acts of sovereign states," but not to "their private and commercial acts." *Dunhill*, 425 U.S. at 695, 96 S.Ct. at 1862; *see also Republic of the Philippines v. Marcos*, 806 F.2d 344, 358 (2d Cir. 1986) (holding that, for the act of

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[2] I emphasize that the Philippines has alleged serious federal offenses under RICO, including mail and wire fraud and the concealment and transportation of stolen property. I also note that the Second Circuit's Marcos case predicated federal jurisdiction on the federal question arising from the foreign policy considerations posed by that action. *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352-54 (2d Cir. 1986).

state doctrine to apply, "the acts must be *public* acts of the *sovereign*"); *Restatement (Revised) of Foreign Relations Law* § 469, at 51 (Tent. Draft No. 7, 1986) (stating that the doctrine applies only to sovereign "acts of a governmental character"). Although the doctrine also applies to the official acts of government officials vested with sovereign authority, *see Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246, 249 (2d Cir.), *cert. denied*, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 (1947); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), it does not apply to private, unofficial conduct of government officials, including heads of state. *Marcos*, 806 F.2d at 359; *see DeRoburt v. Gannett Co.*, 733 F.2d 701, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159, 105 S.Ct. 909, 83 L.Ed.2d 923 (1985). Therefore, to the extent that Ferdinand Marcos, Imelda Marcos, and their agents have engaged in unofficial acts, the act of state doctrine has no application.

The majority's analysis blurs the distinction between the official or unofficial character of the defendants' acts. It first concedes, almost in passing, that "[a] few of Marcos' alleged misdeeds . . . may amount to nothing more than common fraud or theft." Majority op. at 1479; *see also id.* at 1485. Yet the majority's analysis then broadly assumes that Marcos is a "dictator" who "can do whatever he can get away with," *id.* at 1478, 1483 n.9, 1489, and that the challenged acts of the defendants reflect "complex political and policy choices," even if undertaken in part "to serve otherwise improper ends," *id.* at 1485. In short, the majority all but ignores the private, unofficial character of the challenged acts and appears to embrace the sweeping position that the acts of a dictator are necessarily official and insulated from judicial review.[3]

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[3] In Section I.D below, I address the consequences of a more generous reading of the majority's analysis that would in fact permit inquiry into the defendants' unofficial acts of "common fraud or theft."

The majority characterizes the Philippines' complaint as challenging, *inter alia*, Marcos' governmental acts of "expropriation of private property; creating public monopolies; 'grant[ing] government favors, contracts, licenses, loans, and other public benefits.'" Majority, op. at 1478 (quoting Fernando declaration ¶ 8). In fact, however, the Fernando declaration clearly distinguishes between official governmental acts and private, unofficial acts. The full passage quoted in part by the majority states:

> The said taking of Government properties was effected by a range of techniques, including but not limited to accepting payments, bribes, kickbacks, interests in business ventures, and other things of value *in exchange for* the grant of government favors, contracts, licenses, franchises, loans, and other public benefits; expropriating outright private property for the benefit of persons beholden to or fronting for Mr. Marcos, the said expropriation at times effected by violence or the threat of violence or incarceration; arranging loans by the Philippine Government to private parties beholden to and fronting for Mr. Marcos; direct raiding of the public treasury; diverting loans, credits and advances from other governments intended for use by the Philippine Government; creating public monopolies placed in the hands of persons beholden to and fronting for Mr. Marcos.

Fernando declaration ¶ 8 (emphasis added). That a government official may obtain kickbacks, bribes, and interests from the commission of otherwise governmental acts—such as granting a public monopoly or governmental contract—does not convert the acquisition of those kickbacks, bribes, and interests into official, public acts. The majority evidently believes that whatever acts are associated with an ostensibly governmental function are thereby rendered official. I cannot adhere to the posi-

tion that the alleged acts of receiving bribes, plundering the treasury, and extortion are the result of "complex political and policy choices." Majority op. at 1485. Even a dictator is capable of performing private, unofficial acts.

In *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), the Fifth Circuit drew a clear distinction between the official acts and private conduct of a former head of state who was characterized as a dictator. The Republic of Venezuela alleged that Marcos Perez Jimenez, the former president of Venezuela, had committed "financial crimes for his own private personal gain" during the period he served as president. *Id.* at 552. The financial crimes included receiving kickbacks and commissions on government contracts, misappropriating and diverting government payments on construction contracts and land purchases, and securing improvements to his private estate at public expense. *Id.* Jimenez contended that the acts alleged were " 'acts done in the exercise of or in color of his sovereign authority' " and, as such, could not be examined by the courts of this country " 'inasmuch as the judicial authorities cannot review the acts done by a sovereign in his own territory to determine illegality.' " *Id.* at 557. Jimenez argued "that as a 'dictator' he himself would be the sovereign—the government of Venezuela—and that all his acts constituting the financial crimes with which he is charged . . . are acts of state or sovereign acts, the legality of which the Act of State Doctrine precludes [courts from adjudicating]." *Id.* The Fifth Circuit disagreed:

> Even though characterized as a dictator, appellant was not himself the sovereign—government—of Venezuela within the Act of State Doctrine. He was chief executive, a public officer, of the sovereign nation of Venezuela. It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies.

> Appellant's acts constituting the financial crimes of embezzlement or malversation, fraud or breach of trust, and receiving money or valuable securities knowing them to have been unlawfully obtained . . . were not acts of Venezuela sovereignty. . . . *[E]ach of these acts was "for the private financial benefit" of the appellant. They constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being acts of state as rape.*

Id. at 557-58 (citations omitted) (emphasis added);[4] *see also DeRoburt*, 733 F.2d at 704 (distinguishing between the official sovereign acts of the Republic of Nauru, to which the act of state doctrine may apply, and the private, unofficial conduct of its current president, to which the doctrine does not apply).

The Second Circuit also made this distinction clear in its analysis of the applicability of the act of state doctrine to the financial crimes alleged to have been committed by Ferdinand Marcos. *Marcos*, 806 F.2d at 358-59. As in *Jimenez*, Marcos was characterized as a "dictator . . . with personal control over [the] government and economy." *Id.* at 348. The Second Circuit held:

> Appellants simply fail to make the crucial distinction between acts of Marcos as head of state, which may be protected from judicial scrutiny even if il-

[4] The majority apparently concedes the distinction drawn in *Jimenez* between official and unofficial acts of a dictator, but distinguishes *Jimenez* on the ground that judicial review in that case was permitted because of the existence of an extradition treaty. Majority op. at 1484 n.12. I agree, but do not see the point. *Jimenez* still supports the distinction between official and unofficial acts, even for a dictator. The existence of a treaty is relevant to the separate question of embarrasement of our executive branch, discussed below. I do not understand the majority to suggest that the absence of a treaty in this case requires invocations of the act of state doctrine. We must look to other indications from our executive branch. *See infra* Section I.C.

> legal under Philippine law, and his purely private acts. Although the distinction between public and private acts of a foreign official may be difficult to determine, our courts have repeatedly done so.

Id. at 359 (citations omitted).

Therefore, to the extent that the majority holds that the act of state doctrine necessarily bars inquiry into Marcos' acts because of his status as a "dictator," I cannot agree. The doctrine applies only to his official acts.[5] As a descriptive matter, Marcos and his agents no doubt exercised broad power, especially after the imposition of martial law in 1972. But the appropriate inquiry is not to invoke the talismanic label "dictator." The district court should determine which of the challenged acts were official and which were not. Only by doing so can the court determine the extent to which the act of state doctrine may apply. The majority's analysis sweeps them all together.

B. *The Burden of Asserting the Act of State Doctrine*

The majority also fails to take heed of the well-established rule that the burden of establishing that particular conduct constitutes an "act of state" subject to the act of state doctrine is on the party invoking the defense. *See Dunhill*, 425 U.S. at 695, 96 S.C. at 1861; *Marcos*, 806 F.2d at 359. In granting the preliminary injunction against Marcos in the Second Circuit case, District Judge Leval held:

> [T]he applicability of the doctrine is not demonstrated on the present record. Defendants have made

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[5] The Philippine Constitution itself recognizes a distinction between official and unofficial acts of the president. It affords the president complete immunity from any suit brought during his tenure, but provides immunity from suit after he leaves office only for "official acts done by him or by others pursuant to his specific orders during his tenure." Philippine Const. art. VII, § 17.

> no showing that the acts alleged against Ferinand Marcos, much less Imelda Marcos, would necessarily be protected from United States court adjudication.

New York Land Co. v. Republic of the Philippines, 634 F. Supp. 279, 289 (S.D.N.Y.), *aff'd*, *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986). The Second Circuit agreed. "Since the burden of proof is on the party is on the party invoking the act of state defense, appellants must ultimately demonstrate that the challenged acts of Marcos were in fact public acts (the allegations of the complaint covering both public and private acts)." *Marcos*, 806 F.2d at 359-60 (citations omitted). The Second Circuit concluded:

> In short, the district court will necessarily scrutinize the acts that The Republic challenges. Defendants must present evidence that these acts were public (e.g., that Marcos's wealth was obtained through official expropriation decrees or public monopolies). The court then must decide whether to examine these public acts in light of the considerations discussed above. If it chooses not to do so—and the determination whether the Marcoses obtained their wealth illegally . . . is impossible without such scrutiny—the court should consider deferring to a Philippine adjudication that comports with due process. But in any event, at this stage we agree with the position of the United States . . . that the defendants have not discharged their burden of proving an act of state. Only after that burden is met do other relevant factors need to be considered.

Id. at 359.

In this case, Marcos and his co-defendants have not pointed to even a single official sovereign act by which Marcos has acquired any portion of the funds used to purchase the real property and invest in the accounts at issue here. Instead, Marcos merely asserts that *all* of

his conduct during the past twenty years, private and sovereign alike, is subject to the act of state doctrine. The majority's assertion that Marcos is a "dictator" whose acts are insulated from judicial scrutiny eviscerates the defendants' burden of establishing the applicability of the defense to particular acts. Indeed, most of the majority's analysis proceeds on the theory that the *plaintiff* must show that the doctrine does not apply. Majority op. at 1482-88. At this stage of the proceedings, Marcos and his co-defendants have not met their burden of establishing that the challenged acts were official acts to which the act of state doctrine may apply.

C. *The Assertion of Embarrassment to the United States Executive Branch*

The act of state doctrine was "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *First Nat'l City Bank*, 406 U.S. at 762, 92 S.Ct. at 1811. "[T]he doctrine was not compelled by the nature of sovereignty, by international law, or by the text of the Constitution. 'Rather, it derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the government.'" *DeRobuvt*, 733 F.2d at 703 (quoting *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 605 (9th Cir. 1976) (citations omitted); *see also Sabbatino*, 376 U.S. at 421-23, 84 S.Ct. at 936-38.

Particularly disturbing in the majority's analysis are the bare assertions that invocation of the act of state doctrine is necessary to prevent embarrassment to the executive branch of the United States by this litigation. Majority op. at 1482, 1386 n.14, 1486. The majority states that "[o]ur decision will be relatively innocuous only if it is in favor of the plaintiff, if our government's attitudes toward the Philippines is unchanged and if the current Philippine government is still in power." *Id.* at

1482. It asserts that to permit this action to proceed in a United States court may embarrass the United States because the "pendulum" of power between President Aquino and Mr. Marcos or "some third force" may "swing again." *Id.* at 1486.

Putting aside the likelihood of these political predictions actually coming to pass, it is not clear why the majority believes that such potential embarrassment would outweigh the certain, immediate embarrassment in our relations with the current Philippine government if our courts were to shut the door to the Philippines' request for adjudication of the claims. "[T]he act of state doctrine reflects respect for foreign states, so that when a state comes into our courts and asks that our courts scrutinize its actions, the justification for application of the doctrine may well be significantly weaker." [6] *Marcos*, 806 F.2d at 359. "The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered." *Sabbatino*, 376 U.S. at 428, 84

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[6] In another Marcos case, the Fourth Circuit recently rejected the Marcoses's argument that they should be entitled to head-of-state immunity, a doctrine of customary international law. The Fourth Circuit explained:

> Head-of-state immunity is founded on the need for comity among nations and respect for the sovereignty of other nations; it should apply only when it serves those goals. In this case, application of the doctrine to Ferdinand and Imelda Marcos would clearly offend the present Philippine government, which has sought to waive the Marcos[es]' immunity, and would therefore undermine the international comity that the immunity doctrine is designed to promote. Our view is that head-of-state immunity is primarily an attribute of state sovereignty, not an individual right. Respect for Philippine sovereignty requires us to honor the Philippine government's revocation of the head-of-state immunity of Mr. and Mrs. Marcos.

In re Grand Jury Proceedings: John Doe #700, 817 F.2d 1108, 1110-11, (4th Cir. 1987).

S.Ct. at 940. In such a case, "the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government." *Marcos*, 806 F.2d at 359. If at some future time a new political upheaval should bring Marcos back to power, the district court could then reassess the balance of considerations determining the applicability of the act of state doctrine.

Regardless of the merits of the majority's speculation as to the foreign policy consequences of any action or inaction by our courts, I believe that such speculation is entirely inappropriate in this case. The majority opinion ignores the fact that the executive branch has clearly spoken on the question of potential embarrassment to the United States in similar cases. Our executive branch has urged the courts of this country to honor the Philippines' requests for adjudication here and has argued on the Philippines' behalf against the applicability of Marcos' defenses to suit in our courts. *Marcos*, 806 F.2d at 356-57. In a declaration by Michael H. Armacost, Undersecretary of State for Political Affairs, made on March 15, 1986, in a Marcos case pending in the United States Court of International Trade,

> Undersecretary Armacost pointed out that the United States' relations with the Philippines are extremely important and that it is the policy of the United States to strengthen and broaden those relations, especially in light of the two countries' shared basic values such as a commitment to democratic government and respect for human rights. The Armacost declaration also points out that the United States has two of its largest overseas military facilities located in the Philippines, facilities of critical importance to the security of both nations, that the two countries have numerous defense agreements, and that the United States has provided the Philippines with over $250 million in military assistance

in the past five years and permits Philippine nationals to enlist in the United States Navy.

> The statement also emphasizes the important United States-Philippine economic relationship involving in 1985 alone over $3.7 billion worth of bilateral trade, a direct United States investment in the Philippines of over $1.2 billion, and United States monetary aid to the Philippines totaling $226 million. The statement also notes United States-Philippine cooperation in numerous areas including agriculture, education, nuclear energy, and science, and mentions that the United States government recognized the new Philippine government headed by Corazon Aquino and "welcomed its commitment to fulfill the democratic aspirations of the Filipino people." The declaration refers to the establishment of the official Presidential Commission on Good Government headed by former Philippine Senator Jovito Salonga and to the United States' agreement to receive Senator Salonga at a diplomatic level. Undersecretary Armacost asserted that the Aquino government will view the United States' actions on this matter as an important indicator of the future course of our bilateral relations and stated that *it is in the foreign policy interests of the United States to honor the Philippine government's requests at the earliest possible time.*

Id. at 357 n. 3 (emphasis added). The Second Circuit also noted that a letter from the United States Department of Justice, with the concurrence of the Office of the Legal Advisor to the Department of State, argued that Marcos and his co-defendants had not discharged their burden of proving acts of state. *Id.* at 356-57.

Thus, the Second Circuit concluded that "[t]he United States has made it clear that it does not fear embarrassment if the courts of this country were to take jurisdiction of *this and other disputes* between The Republic and

ex-President Marcos." *Id.* at 356 (emphasis added). The majority's assertion that adjudication of the Philippines' claims in a United States court would cause embarrassment to our executive branch is therefore unfounded.[7] Given such guidance, it is not the judiciary's role to appraise the wisdom of the executive branch's foreign policy.

Although the position of our own executive branch is not dispositive of the of act state inquiry, *see id.* at 358, the executive's appraisal of the disruptive effect that denying the Philippines access to our courts would have on the conduct to our courts would have on the conduct of sensitive foreign policy is entitled to considerable deference. *See First Nat'l City Bank*, 406 U.S. at 768, 92 S.Ct. at 1813 (holding that the United States courts should defer to the executive "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy"); *id.* at 776, 92 S.Ct. at 1817 (Powell, J. concurring) (stating that "[w]hen it is shown that a conflict in those roles [of the judicial and political branches] exists, . . .

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[7] The majority's attempt to explain away the significance of the statements and actions of our executive branch in other Marcos suits, *see* Majority op. at 1487-88, is strained and unpersuasive. Every indication supports the conclusion that the executive branch fears no embarrassment from the Philippines' suit. Conversely, the majority can point to no evidence that would support its contrary ruminations on foreign policy.

Moreover, the majority infers that the executive branch supports granting the Philippines' requests to freeze Marcos' assets *only* if ultimate adjudication on the merits is made in Philippine courts. *Id.* at 1487-88. Here, the Philippines has requested a freeze of assets; at a later date, the district court will rule on the forum non conveniens issue and determine where the merits will be tried. Ironically and illogically, the majority concludes that, because the Philippines has also requested adjudication of the merits in our courts, *no* freeze will issue.

the judiciary should defer"); *id.* at 790, 92 S.Ct. at 1824 (Brennan, J., concurring) (stating the "the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine"); *Jimenez*, 311 F.2d at 558 (stating, with respect to the separation of powers concern underlying the act of state doctrine, that the judiciary customarily defers to the executive branch, "the branch of government charged with international relations").[8] Given the executive branch's guidance on whether our courts should entertain the Philippines' claims, the majority's assertions to the contrary—though suspect on their own terms—are inappropriate and unfounded.

D. *The Relationship of the Act of State Doctrine to the Probability of Success on the Merits*

The majority reasons that, because the act of state doctrine bars inquiry into all or most of the challenged acts, the Philippines' "net worth" theory will collapse, thus rendering the plaintiffs' probability of success on the merits low. Majority op. at 1480-81. I cannot agree with this argument's predicate or its ultimate conclusion.

As discussed above, the majority's analysis casts the scope of the act of state doctrine far too broadly, ignores the defendants' burden of proving its applicability, and disregards the guidance of our executive branch. The majority prematurely assumes that only "[a] few" of Marcos' acts will prove to be private, unofficial acts, while "the vast majority" will prove to be public, official acts. Majority op. at 1479, 1482. This guess as to the proportion of official and unofficial acts ignores not only Mar-

[8] Unaccountably, the majority assets that even an explicit instruction from the executive branch in this case probably would not materially alter its analysis and that embarrassment to foreign relations is "a relatively minor consideration." Majority op. at 1488 n. 20.

cos' burden of proving which acts are in fact official, but also the incomplete record before the district court when it ruled on the preliminary injunction. But even assuming (1) that Marcos could later establish that some challenged acts were official and (2) that the district court would determine, after "balanc[ing the] relevant considerations," [9] *see Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940, that the act of state doctrine bars claims based on those official acts, I cannot conclude that the Philippines will be unable to recover on the basis of private, unofficial acts that the doctrine does not reach. The majority simply asks too much of the Philippines' "net worth" theory, especially in view of the procedural posture of this case. It treats the "net worth" theory almost as a cause of action that must be followed through to completion at trial. *See* Majority op. at 1479-81. However, it is merely the evidence of wrongdoing that the Philippines has compiled at this preliminary stage.

The Philippines filed this action on June 16, 1986. The complaint alleged pendent claims for conversion, fraud, and deceit. It charged that the Marcoses reported $337,429 of income during the twenty-year period during which Marcos was in office, while holding investments of $1.55 billion. In support of its preliminary injunction

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[9] Far from being an "inflexible and all-encompassing rule," *Sabbatino*, 376 U.S. at 428, 84 S.Ct. at 940, the question " '[w]hether to invoke the act of state doctrine is ultimately and always a judicial question.' " *Marcos*, 806 F.2d at 358 (quoting *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 521 n. 2 (2d Cir.), *cert. dismissed*, —— U.S. ——, 106 S.Ct. 30, 87 L.Ed.2d 706 (1985)). Application of the doctrine requires "a balancing test with the critical element being the potential for interference with our foreign relations." *DeRoburt*, 733 F.2d at 703; *Banco Credito Agricola*, 757 F.2d at 521 ("The doctrine demands a case-by-case analysis of the extent to which in the context of a particular dispute separation of powers concerns are implicated" with primary emphasis on whether "judicial consideration of the foreign sovereign's act . . . would embarrass or hinder the executive in the realm of foreign relations."). *See supra* pp. 1495-96.

motion, the Philippines produced evidence corroborating this discrepancy and documentation of the "paper trail" linking the Marcoses to specific properties and bank accounts through aliases and shell corporations. *See infra* pp. 1500-01. On the basis of this evidence, on June 25, 1986—before the parties had conducted discovery—the district court granted the preliminary injunction.

At this stage of the litigation, the Philippines set forth its "net worth" theory as evidence in support of its request for a preliminary injunction. The evidence of a discrepancy on the order of $1.55 billion, coupled with specific documentation of the paper trail, is highly probative of wrongdoing. But we have no reason to conclude, much less require, that the Philippines must proceed on a "net worth" theory at trial, after discovery has taken place. Therefore, even if the act of state doctrine *might* bar inquiry into some official acts, thus weakening a "net worth" evidentiary theory, I cannot conclude that the Philippines' substantive claims must fail at trial.

E. *Conclusion*

We cannot ignore the substantial allegations of private, unofficial acts of common theft, misappropriation, fraud, and concealment merely because Marcos was serving as the Philippines' president when he allegedly committed these crimes. Just because Marcos was in a position to commit these acts when he was president does not render these acts "official." The majority concedes that "if [Marcos] entered the public treasury at gunpoint and walked out with money or property belonging to the Philippines, he would not be protected by the act of state doctrine." Majority op. at 1484. This, I believe, expresses the essence of the Philippines' complaint—whether the Marcoses raided the public treasury "at gunpoint," by extortion, or by theft.

The Second Circuit addressed a similar factual situation and the identical issue we face here—whether the

act of state doctrine renders the Philippines' probability of success on the merits low—in a well-reasoned unanimous opinion affirming the issuance of a preliminary injunction against Marcos. *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir.1986). The Second Circuit rejected Marcos' argument that the act of state doctrine precludes inquiry by the courts of this country into his alleged misdeeds. The court held that Marcos had failed to sustain his burden of demonstrating that the acts of theft, misappropriation, fraud, and concealment alleged by the Philippines were all official sovereign acts, to which the act of state doctrine may apply, rather than private acts, to which the doctrine does not apply. *Id.* at 348-49, 359. The court observed that our executive branch had expressly supported the Philippines' suits against Marcos in this country. *Id.* at 356-57 & n. 3. The court concluded that Marcos had not demonstrated that the act of state doctrine was likely to apply reducing the Philippines' likelihood of success on the merits to less than a substantial probability. The court also stated that, although the Philippines had requested only a preliminary injunction and recognition of an eventual Philippine decree in that case, *see id.* at 361, there was "*no bar to the grant of a preliminary injunction and the district court may either itself determine ownership or defer to Philippine proceedings*," *id.* at 356 (emphasis added).[10] The reasoning of the Second Circuit is persuasive. I believe that the district court correctly concluded that, at least at this stage of the proceedings, the act of state doctrine does not have a negative impact on the calculus of the Philippines' likelihood of success on the merits.[11]

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[10] The majority's attempt to distinguish the Second Circuit case on the ground that adjudication on the merits would take place in the Philippines, *see* Majority op. at 1490 n. 25, is thus inconsistent with that court's own assessment of the case.

[11] A related argument advanced by the defendants and apparently adopted by the majority, *see* Majority op. at 1488-90, is that resolu-

II. THE ISSUANCE OF THE PRELIMINARY INJUNCTION

The majority does not discuss the district court's assessment of the probability of success on the merits of the pendent claims on which the preliminary injunction was based, because of its reliance on the act of state doctrine. Since I believe that the act of state doctrine does not bar the preliminary injunction, I wish to emphasize that the district court's application of the preliminary injunction test was correct.

In order to obtain a preliminary injunction, the Philippines may "demonstrate the probability of success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in its favor." *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097, 1102 (9th Cir.1987). We review the district court's determination with respect to probability of success for abuse of discretion. *Sierra On-*

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tion of the merits in this case will be thwarted by problems of justiciability. The Second Circuit found that "there is nothing more unmanageable about this case than about any other case involving theft, misappropriation, corporate veils, and constructive trusts." *Marcos*, 806 F.2d at 356. I agree. Once the role of the act of state doctrine in this case is put into proper perspective, the potential for justiciability problems in this case does not loom large. First, no legitimate "political questions" are raised by this litigation outside of the prudential considerations relevant to analysis of the act of state doctrine. Second, although the district court has not yet ruled on what law will apply to each of the pendent claims, the defendants present no basis on which to believe that the selection of appropriate state, federal, and Philippine law will be difficult.

Even if the district court ultimately determined that Philippine courts were the appropriate forum in which to try the merits of those issues governed by Philippine law, the court would nonetheless maintain the preliminary injunction freezing the assets pending the resolution of those issues. In such a case, the court might still retain jurisdiction to adjudicate the claims based on federal and state law and to enforce any judgment based on a trial in Philippine or American courts.

Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir.1984). At the preliminary injunction stage, "[t]he district court is not required to make any binding findings of fact; it need only find probabilities that the necessary facts can be proved." *Id.* at 1423. The district court may "reasonably assume that more evidence in the same vein" as that offered in support of the preliminary injunction "could be produced at trial." *Id.*

The majority suggests, but does not decide, that the probability of success should be determined by looking at both the federal RICO claims, on which subject matter jurisdiction is predicated, and the pendent claims, under which the injunction was issued. Majority op. at 1480; *see also id.* at 1479. I believe that the probability of success on the merits should be determined solely by reference to the pendent claims when, as here, the federal claims cannot support injunctive relief. *See USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 98 (6th Cir.1982) (analyzing only the pendent state claims when RICO established subject matter jurisdiction).

This approach fully supports the policies underlying pendent jurisdiction—"the conservation of judicial energy and the avoidance of multiplicity of litigation," *Rosado v. Wyman*, 397 U.S. 397, 405, 90 S.Ct. 1207, 1214, 25 L.Ed. 2d 442 (1970)—that would be defeated if plaintiffs were encouraged to bring parallel actions in federal and state courts in order to obtain a preliminary injunction under the pendent claims. This approach also renders unnecessary any speculation by the district court or the court of appeals as to whether the district court would, in the exercise of its discretion, retain or dismiss the pendent claims in the event the federal claims are dismissed on a Rule 12(b)(6) motion or summary judgment at some later date. *See In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1490-91 (9th Cir.1985) (retaining pendent claims after a Rule 12(b)(6) dismissal of federal claims for reasons of judicial economy, convenience,

and fairness to the parties); *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977). In the event that early dismissal of the RICO claims should occur in this case, a preliminary injunction issued solely on the basis of the pendent claims would have preserved the status quo with respect to those claims, whether the district court retains jurisdiction over them or decides that they should be pursued in another forum. It would be ironic indeed if the district court were to deny a preliminary injunction in part on the basis of an assessment of the federal claims, later dismiss those claims but retain jurisdiction over the pendent claims, and then realize that a preliminary injunction should be issued under the retained pendent claims. Therefore, I believe that the proper inquiry is to determine the likelihood of success of the pendent claims alone.

In this case, the Philippines offered a verified complaint, supporting affidavits, and evidence, including the Marcoses' income tax documents, Swiss and California bank documents showing the establishment of accounts under aliases and the subsequent investment by Ferdinand and Imelda Marcos of substantial amounts of funds originating in the Philippines, and deed and trust documents reflecting a complicated series of investments by Marcos in real property in this judicial circuit. Marcos and his co-defendants failed to offer any affidavits or evidence to contradict the affidavits and evidence offered on behalf of the Philippines. The district court properly could presume that the Philippines' evidence and affidavits were true. *See* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2949, at 474-75 (1973).

The materials before the district court provided a reasonable basis for it to conclude that the Philippines would be able to establish at trial, after discovery had fully taken place, the necessary facts to show that the Philippines had indeed been the victim of theft, misappropria-

tion, fraud, and concealment at the hands of the defendants. The Philippines produced documentation of the Marcoses' past income tax returns and an affidavit of Benigno Alas, formerly a licensed CPA in the Philippines, which analyzed those documents. The analysis strongly indicates that at least some, and probably a large part, of the Marcoses' current assets were wrongfully acquired. Mr. Alas concluded that the discrepancy between the Marcoses' aggregate income of $337,429 during the twenty-year period Marcos was in office and their alleged current assets of $1.55 billion would be "extremely difficult, if not impossible, to explain from lawful sources."

The verified complaint and an affidavit of Rafael Fernando, West Coast Representative and Coordinator of the Philippines' Presidential Commission on Good Government, charge that the Marcoses acquired much of these assets through conversion, fraud, deceit, use of undue influence, and conspiracy. Although some of these allegations may be based on hearsay and thus be inadmissible at trial, in view of the exigent circumstances attending application for a preliminary injunction, the district court could properly consider them. *See Flynt Distributing Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir.1984); 11 C. Wright & A. Miller, *supra*, § 2949, at 471-72. In addition, the Philippine government, in creating the Commission on Good Government, stated that it was in possession of evidence showing that the Marcoses' assets were wrongfully acquired through "improper or illegal use of funds or properties owned by the Government of the Philippines . . . or by taking undue advantage of their office, authority, influence, connections or relationship, resulting in their unjust enrichment and causing grave damage and prejudice to the Filipino people and the Republic of the Philippines." Executive Order No. 2, at 1; *see also* Executive Order No. 1, sec. 2(a).

Finally, the Philippines produced uncontroverted evidence indicating that the Marcoses have established Swiss

bank accounts under aliases and that funds were transferred to these banks through California banks. It produced evidence of Marcos' transfer of substantial funds from the Philippines into two accounts in Lloyds Bank in California, and documentation concerning the ownership and transfers of interests in the Beverly Hills property. The district court properly could assume that more evidence of the paper trail "in the same vein" would be revealed once discovery had taken place. *See Sierra On-Line*, 739 F.2d at 1423. The uncontroverted evidence of property and funds acquired by the Marcoses, coupled with the evidence discussed above, supports a reasonable conclusion by the district court that the Philippines had a "substantial likelihood" of prevailing on the constructive trust claims for the identified property and on the accounting claim to determine what other, as yet unidentified, property is held by the Marcoses that should also be subject to a constructive trust. Thus, I believe that the district court clearly did not abuse its discretion in finding a substantial likelihood of success on the pendent claims.

The district court also found that the Philippines would suffer irreparable injury without the issuance of a preliminary injunction. The district court found a "substantial danger" that, if a preliminary injunction were not granted, the defendants would transfer or conceal property, funds, books, and records beyond the court's process, thereby vitiating possible relief in the return of specific property under the constructive trust claim and in the examination of books and records under the accounting claim. Based on the evidence of complex transfers and concealment before the district court, the court's factual finding of "substantial danger" was not clearly erroneous. Neither was the court's conclusion that the harm to the Philippines resulting from such transfer and concealment would be irreparable. Transfer and concealment of the books and records would prevent the court from being able to provide meaningful relief on the accounting

claim; the harm would therefore be irreparable. Moreover, because the Philippines seeks the return of both specific, identified property in California and as yet unidentified property under its quiet title claim, the harm from such transfer and concealment would also be irreparable. Thus, I firmly believe that the district court did not abuse its discretion in granting the preliminary injunction.

At a minimum, I believe that we may affirm on the alternative ground that "serious questions are raised and the balance of hardships tips sharply" in the Philippines' favor. *Hoopa Valley Tribe*, 805 F.2d at 879; *see also Marcos*, 806 F.2d at 346 (upholding a preliminary injunction that the district court had issued on this ground). Clearly, this case presents serious questions on the merits. *See Benda v. Grand Lodge of the Int'l Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir.1978) (stating that the "irreducible minimum" for issuing a preliminary injunction is whether there is a "fair chance of success on the merits" or the questions are "serious enough to require litigation"), *cert. dismissed*, 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979). The majority opinion summarily, and I believe wrongly, dismisses this alternative approach. Majority op. at 1489-90.

In addition, the district court stated at the conclusion of the preliminary injunction hearing: "Balancing the hardship, the hardship is clearly greater on the side of the plaintiff." Transcript of Preliminary Injunction Hearing at 52.[12] In his appellate brief, Marcos stated that he would agree to freeze the assets involved in this suit if the suit were brought in the Philippines. This statement underscores the point that the issuance of a preliminary injunction imposes no hardship on him. In-

[12] The court's written order did not include this finding. It issued the preliminary injunction instead on the basis of substantial likelihood of success on the merits and substantial danger of irreparable harm to the Philippines.

deed, *the defendants have introduced no evidence whatsoever to show how they might be harmed by the issuance of the preliminary injunction.* The injunction is structured to ensure that Marcos will be able to use funds to pay "attorneys' fees and normal living expenses." The only restraint is that the Philippines must have 24 hours' notice of a request to free assets for these purposes. Should it turn out later that the preliminary injunction was wrongfully issued, the $100,000 bond provided by the Philippines under Fed.R.Civ.P 65(c) will mitigate or cover any financial injury suffered by the defendants as a result of the injunction. *See Costandi v. AAMCO Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972) (per curiam); 11 C. Wright & A. Miller, *supra*, § 2948, at 444-45. Therefore, I believe that we may affirm on this alternative ground.

At the very least, prudence in a case as important as this would dictate a remand to the district court to make an explicit finding on the balance of hardships. However, in view of the district court's express statement in open court on the balance of hardships tipping in favor of the Philippines, the absence of any evidence of harm to the Marcoses, and Marcos' representation on appeal that he objected to the forum, not the freezing of his assets, I believe that we may affirm on the alternative ground fairly supported by the record.

In sum, I believe that much of the majority opinion reflects a concern for whether this case should be litigated in United States courts or in Philippine courts. Whether in view of the federal and pendent claims, and the underlying offenses against Philippine law, the district court should exercise its discretion to defer to a forum in the Philippines is a question not before this court. The issue is the propriety of a preliminary injunction to maintain the status quo pending the determination of the forum non conveniens and other issues. I cannot say that the district court abused its discretion in issuing the preliminary injunction. I therefore dissent.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CIV. 86-3859-MRP(Gx)

THE REPUBLIC OF THE PHILIPPINES,
Plaintiff,

FERDINAND E. MARCOS, an individual; IMELDA R. MARCOS, an individual; GREGORIO ARANETA, an individual; RAMON AZURIN, an individual; ANTONIO O. FLOIRENDO, an individual; DIOSDADO C. ORDONEZ, an individual; KRODO PROPERTIES, N.V., a Netherlands Antilles Corporation; CALMO HOLDINGS, N.V., a Netherlands Antilles Corporation; ANCOR HOLDINGS, N.V., a Netherlands Antilles Corporation; AL DJEBEL CORPORATION, a Grand Cayman Corporation; LLOYDS BANK OF CALIFORNIA, a California corporation,
Defendants.

ORDER ISSUING PRELIMINARY INJUNCTION

[Filed June 25, 1986]

On June 16, 1986, this Court entered a Temporary Restraining Order and Order to Show Cause on the *ex parte* application of plaintiff The Republic of the Philippines ("the Philippines"). Pursuant to that Order, the parties have filed memoranda in support of and in opposition to the granting of a preliminary injunction, and this matter has come on for hearing on June 25, 1986.

Having considered the evidence and the parties' memoranda and argument, it appears to the satisfaction of this Court that this is a proper case for the granting of the preliminary injunction prayed for by the Philippines as

herein set forth. This Order is based on the Court's findings of fact and conclusions of law set forth below.

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The evidence establishes the facts necessary to conclude, for purposes of the issuance of preliminary relief, that this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that this action arises under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* The Court further finds as follows:

A. The evidence establishes a substantial likelihood that defendants have operated, conducted the affairs of, and invested in enterprises in violation of RICO.

B. The evidence sufficiently demonstrates that the affairs of the above enterprises were conducted through a pattern of racketeering including the commission of "predicate acts" of racketeering in the United States and in this judicial district. Such predicate acts include but are not limited to the obtaining and transfers of interests in real estate located in Beverly Hills, California, the maintenance of bank accounts with defendant Lloyd's Bank of California, and the transportation to Hawaii of approximately $8.2 million worth of property and funds. The Court therefore finds, preliminarily, that plaintiff has adduced sufficient evidence that defendants have committed predicate acts of racketeering in the United States and in this judicial district. Such predicate acts include but are not limited to mail fraud (18 U.S.C. § 1341), wire fraud (*id.* § 1343), transportation of stolen goods in foreign commerce (*id.* § 2314), and receipt, concealment, and sale of goods in foreign commerce (*id.* § 2315).

(C). A foreign government is a "person" within the meaning of 18 U.S.C. § 1961(a) and may bring suit under RICO. Accordingly, plaintiff herein is a proper RICO plaintiff.

2. This Court has pendent jurisdiction over plaintiff's other claims under state and foreign law in that such claims arise from a common nucleus of operative fact and are so intertwined with other matters pending before this court as to make the exercise of such jurisdiction over these claims appropriate.

3. Plaintiff has made a prima facie showing that this Court has jurisdiction over the persons of defendants.

4. This Court may therefore enter preliminary relief appropriate on plaintiff's pendent claims since it has subject-matter jurisdiction over those claims and this action and personal jurisdiction over the parties.

5. A preliminary injunction is appropriate on plaintiff's pendent claims, including but not limited to those for constructve trust and an accounting. This Court specifically finds:

(1) That there is a substantial danger that, if this Order were not issued, the parties against whom this Order is directed would transfer or conceal funds, property, books and records, placing said items beyond the Court's process and recovery by the Philippines in this action.

(2) That the Philippines therefore would be irreparably injured if this Order were not issued.

(3) That there is a substantial likelihood that the Philippines will prevail in this action, and that the Philippines will be entitled to an accounting for, and to impose a constructive trust upon, the property subject to this Order.

(4) That an injunction is necessary to preserve the status quo.

(5) That the Philippines' remedies at law are not adequate to prevent such irreparable harm.

(6) That the Philippines need not meet the requisites for an Order of attachment under California law.

(7) That counsel for the Philippines has made a good faith effort to give notice to all defendants of the issuance of the Order to Show Cause and that, to the extent the instant Order is deemed to have been issued without notice, the provision of any additional notice would have been impracticable or impossible and would have created a substantial danger that funds, assets, books, and records might have been transferred or concealed before the matter could be heard.

II.

IT IS THEREFORE ORDERED AND DECREED that Defendants Ferdinand E. Marcos, Imelda R. Marcos, Gregorio Araneta, Ramon Azurin and their respective officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive notice of this Order by personal service or otherwise, and each of them, be and hereby are preliminary enjoined from, directly or indirectly, receiving or obtaining possession or custody of, or control over, or causing any other individual or entity to obtain or receive possession of or control over, any jewelry, assets or other property, or any portion thereof, in the possession, custody, or control of the United States Customs Service ("Hawaii property"). Nothing in this Order is believed to, nor is this Order intended to, interfere or conflict with existing orders of the Honorable Harold M. Fong or the U.S. Court of Appeals concerning the Hawaii property. If subsequent orders are issued which any party believes to be in conflict with this Order insofar as it pertains to the Hawaii property, the parties are directed to notify

this Court forthwith and move this Court, after notice to all parties, to make appropriate modifications.

III.

IT IS FURTHER ORDERED AND DECREED that, except as otherwise ordered by this Court, defendant Lloyds Bank shall continue to hold and maintain custody over all funds and deposits of any nature held for the benefit of any defendant herein and specifically shall hold and maintain any properties beneficially or otherwise held for the account of Imelda Marcos in accounts 5900020 and 4099657 maintained with Defendant Lloyds Bank of California ("Lloyds Bank Accounts").

IV.

IT IS FURTHER ORDERED AND DECREED that, except as otherwise ordered by this Court on at least 24 hours prior notice to counsel for the Philippines, the defendants Ferdinand E. Marcos and Imelda R. Marcos, Antonio E. Floirendo, Diosdado C. Ordonez, Krodo Properties, N.V., Calmo Holdings, N.V., and Al Djebel Corporation and their respective officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, and each of them, be and hereby are restrained and enjoined from, directly or indirectly:

A. transferring, conveying, encumbering, dissipating, converting, concealing, or otherwise disposing of in any manner any funds, assets, claims or other property or assets owned or controlled by, or in the possession or custody of such individuals or entities, held by or in any way on behalf of or for the benefit of Ferdinand or Imelda Marcos, including but not limited to: Property located at 1085 Summit Drive, Beverly

Hills, California ("Beverly Hills Property"), whose legal description is as follows:

> Lot 1 of Tract No. 20373, as per map thereof recorded in Book 563, Pages 1 and 2 of Maps, in the Office of the County Recorder of Los Angeles County, except that portion thereof described as follows: Beginning at the southwesterly corner of said Lot 1; thence southeasterly along the southwesterly line of said Lot sixty-four (64.00) feet to the most southerly corner of said Lot; thence northeasterly along the southeasterly line of said Lot twelve (12.00) feet; thence northwesterly in a direct line to the point of beginning;

Provided, however, that as to such properties and assets other than the Hawaii property, Lloyds Bank Accounts, and Beverly Hills property, defendants Ferdinand E. Marcos and Imelda Marcos may use said funds or assets to pay attorneys' fees and normal living expenses; and

B. destroying, mutilating, concealing, transferring, altering, or otherwise disposing of in any manner any books, records, computer programs, computer files, computer printouts, correspondence, memoranda, brochures, or any other documents of any kind, of or pertaining in any manner to any of such individuals or entities or any of the above-described properties, except to their attorneys or in compliance with lawful judicial orders.

V.

IT IS FURTHER ORDERED AND DECREED that Plaintiff may take expedited discovery from any and all defendants named in this action, George Hamilton, Marta

Thoerner, and their respective officers, agents, servants, and employees, and other entities and/or persons whose testimony and or production of documents may be relevant to this action, at times and locations to be approved by Order of this Court. Such Order, once issued, may be served in the same manner as set forth below or as otherwise provided in Rule 5, Fed. R. Civ. P.

VI.

IT IS FURTHER ORDERED AND DECREED that this Order may be served on defendants as follows:

1. *On defendants Ferdinand Marcos, Imelda Marcos, Gregorio Araneta, and Ramon Azurin*: by delivery to such defendants at the Marcos residence in Hawaii, or, in the event that the person attempting to serve such defendants personally is not permitted access to that residence, upon security or other personnel at the residence. Remigius Taum is hereby specially appointed pursuant to Rule 4(c)(1), Fed. R. Civ. P., for the purpose of serving this Order on such defendants.

2. *On defendant Antonio Floirendo*: by delivery to Rosenman, Colin, Freund, Lewis & Cohen, 575 Madison Avenue, New York, New York and by delivery to St. James Tower, 415 East 59th Street, New York, New York 10022. Joseph J. Finn is hereby specially appointed for the purpose of serving this Order on such defendant, as provided above.

3. *On defendant Diosdado Ordonez*: by personal delivery. Joseph J. Finn is hereby appointed for the purpose of serving this Order on such defendant.

4. *On defendant Ancor Holdings, N.V.*: by delivery to Diosdado Ordonez and by mailing, by any form of mail requiring a signed receipt, to Ancor Holdings, N.V., c/o Secretary of State, Albany, New York 12231 and to Ancor Holdings, N.V., c/o Curacao Corp. Co., N.V., De

Ruyter Kade 62, Curacao, Netherlands Antilles. Joseph J. Finn is hereby specially appointed for the purpose of serving the Order on such defendant by delivery to Diosdado Ordonez, as provided above.

5. *On defendant Calmo Holdings, N.V.*: by delivery to Diosdado Ordonez. Joseph J. Finn is hereby specially appointed for the purpose of serving this Order on such defendant by personal delivery to Diosdado Ordonez, as provided above.

6. *On defendant Krodo Properties, N.V.*: by delivery to the clerk of this Court and to Greenberg, Glusker, Fields, Claman & Machtinger, 1900 Avenue of the Stars, Suite 2000, Los Angeles, California 90067. Louis Cabrera and Glen Garcia are hereby specially appointed for the purpose of serving this Order on such defendant by delivery, as provided above.

7. *On defendant Al Djebel Corporation*: by delivery to the clerk of this Court and to Gateway Brokerage & Management Co., 11661 San Vicente Blvd., Suite 10, Los Angeles, California 90049. Glen Garcia and Louis Cabrera are hereby specially appointed for the purpose of serving this Order on such defendant by delivery, as provided above.

8. *On defendant Lloyds Bank of California*: by personal delivery. Glen Garcia is hereby specially appointed for the purpose of serving this Order on such defendant.

VII.

IT IS FURTHER ORDERED AND DECREED that a bond of $100,000 shall be posted on or before June 30, 1986 at 4:00 p.m. and that the bond of $25,000 shall be maintained until the $100,000 bond is posted on June 30, 1986. The $100,000 bond shall be maintained while the injunction is in effect.

DATED: June 25, 1986 4:45 p.m.

/s/ Mariana R. Pfaelzer
United States District Judge

Presented by:

SEVERINA B. RIVERA
PRESIDENTIAL COMMISSION ON
GOOD GOVERNMENT
REPUBLIC OF THE PHILIPPINES

MUNGER, TOLLES & OLSON
RONALD L. OLSON
RICHARD B. KENDALL
JOSEPH D. LEE
FELICIA A. MARCUS

By
RICHARD B. KENDALL

Attorneys for Plaintiff
THE REPUBLIC OF THE PHILIPPINES

No. 86-6091, 86-6093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPUBLIC OF THE PHILIPPINES,
Plaintiff-Appellee,

v.

FERDINAND E. MARCOS, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR UNITED STATES OF AMERICA AS *AMICUS CURIAE*

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6091, 86-6093

REPUBLIC OF THE PHILIPPINES,
Plaintiff-Appellee,
v.

FERDINAND E. MARCOS, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

BRIEF FOR UNITED STATES OF AMERICA AS *AMICUS CURIAE*

This brief is filed in response to the Court's Order of December 7, 1987 requesting the United States to file a brief as *amicus curiae* in this case "addressing the act of state doctrine."

The United States appreciates this opportunity to present its views to the court. As set forth below (*see* pp. 30-37, *infra*), we believe that the act of state doctrine is both narrower and more precise than the panel's opinion suggests. We also believe that, because of the undeveloped state of the record, it is not possible at this

stage to determine to what extent the act of state doctrine may apply to this case. For those reasons, it is our view that the act of state doctrine does not have any major bearing on the question before the court on this appeal: whether the preliminary injunction should be affirmed.

It would not be appropriate, however, for us to leave the matter there. The district court concluded that there was a "substantial likelihood" that plaintiff would be entitled to an accounting and a constructive trust covering all of the defendants' assets, and on that basis preliminarily enjoined the defendants from transferring any Marcos property anywhere in the world. In our view, the record before the district court did not furnish a basis on which that court could find a "substantial likelihood" that plaintiff would recover in that court on the *non*-federal claims that constitutes the bulk of its claim for relief. In these circumstances, for reasons we set forth below, we do not believe it was appropriate to issue preliminary relief of the scope granted by the district court.

The panel reversed the injunction essentially on the ground that plaintiff's claim would be barred by the act of state doctrine. We believe this, too, was error at this stage of the proceedings; it is not now clear that any "act of state" will be involved in this case, or that the doctrine will bar its adjudication. However, we believe that some of the concerns expressed by the panel about the amenability of plaintiff's claim to resolution in the district court *do* bear on the "likelihood of success" and should be considered at this stage of the case. Such concerns more properly fall under the headings "jurisdiction," "comity," and "*forum non conveniens.*" Accordingly, we first discuss below those issues which bear more directly on the present question and follow with a detailed interpretation of the act of state doctrine.

STATEMENT OF THE CASE

1. *Statement Of Facts And Course of Proceedings Below.*

On June 16, 1986, plaintiff Republic of the Philippines filed the present civil action in the United States District Court for the Central District of California against Ferdinand E. Marcos, the former President of the Philippines, Imelda Marcos, and various other individuals and corporations. Complaint ¶ 4-11, ER 4-7.[1] The complaint asserted jurisdiction based on the federal question statute, 28 U.S.C. § 1331, and charged all defendants (except Lloyds Bank) with three civil violations of the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. §§ 1961 *et seq.* Complaint ¶¶ 2, 27-41, ER 3, 13-21. The complaint also alleged various pendent "state law" claims against some or all of the defendants, including conversion, fraud and deceit, constructive fraud, constructive trust, breach of implied contract, quiet title, accounting and subrogation. Complaint ¶¶ 42-86, ER 21-31. The complaint sought treble damages and attorneys' fees under RICO (18 U.S.C. § 1964(c)), compensatory damages on the "state law" claims, an accounting, dis-

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[1] All references to the Excerpts of Record filed by Appellants herein will be referred to as "ER."

Other individual defendants include Ramon Azurin, Gregorio Araneta, Antonio O. Floirendo and Diosdado Ordonez. *Id.* The complaint also names the following corporate defendants: Calmo Holdings, N.V., Krodo Properties, N.V., and Ancor Holdings, N.V., all alleged to be Netherlands Antilles corporations; Al Djebel Corporation, a corporation alleged to be organized under the laws of the Cayman Islands; and Lloyds Bank of California, a corporation organized under the laws of California. *Id.* Plaintiff Republic has stated that Lloyds Bank "is not alleged to have conspired or participated in the other defendants' scheme to defraud the Philippines" but is included by reason of its possession of certain funds (two bank accounts) to which plaintiff contends it is entitled to recover. Complaint ¶ 61-69, ER 26-27 (constructive trust); Appellee's Brief, at 5.

gorgement of profits and other equitable relief, punitive and exemplary damages, the costs of suit and "such other relief as the Court may deem proper." Complaint, Prayer For Relief, ER 31-36. While the Complaint sought recovery of specific property alleged to be worth $4.8 million and located within the district court's jurisdiction, the bulk of the property claimed ($1.5 billion) was alleged to be located in Switzerland. Complaint ¶¶ 16-24, ER 9-12.[2]

Plaintiff sought preliminary relief, alleging, *inter alia*, that the assets held by or on behalf of Mr. and Mrs. Marcos (some of which assets were specifically identified) "constitute unexplained wealth and would be extremely difficult, if not impossible, to explain from lawful sources"—*i.e.*, that substantially all of the Marcoses' present "net worth," after subtracting their reported "net worth" when Mr. Marcos took office, their salaries as Philippine government officials and a reasonable return thereon, must have been obtained illegally in contravention of plaintiff's rights. Alas Declaration ¶¶ 3-5, ER 196, 197-200; Complaint ¶¶ 12-14, ER 7-8. In support of this claim, the plaintiff filed with the district court copies of the Marcoses tax returns (ER 203-297), a certification as to their salaries as Philippine government officials (ER 298), and a variety of documents purporting to show assets held by the Marcoses or on their behalf throughout the world. These documents included Notes and Deeds of Trust to properties between the corporate and/or minor individual defendants and various third parties (*see* ER 340-51, 391-405, 837-42), powers of

[2] The same day it filed its complaint, the Republic obtained a temporary restraining order from the district court (Pfaelzer, D.J.) restraining defendants from, *inter alia*: (1) transferring, dissipating or otherwise disposing of any assets held by or on behalf of Ferdinand or Imelda Marcos; and (2) destroying, concealing or otherwise disposing of any of defendants' records. June 16, 1986 Temporary Restraining Order And To Show Cause Re: Preliminary Injunction, ER 59-64.

attorney (ER 387-90, 724), various and sundry bank records (ER 407-18, 725-38), and many pleadings and orders from other civil actions filed by plaintiff against defendants in other jurisdictions (ER 790-829, 843-56, 864-99), the latter of which were supplemented in some cases by news articles about defendants' claimed "wealth" (*e.g.*, ER 814-20).

On June 25, 1986, the district court, after a hearing, entered a global preliminary injunction against defendants. June 25 Order Issuing Preliminary Injunction, ER 47-58. The court held that it had subject matter jurisdiction under RICO because "plaintiff has adduced sufficient evidence that defendants have committed predicate acts of racketeering in the United States and in this judicial district" and "have operated, conducted the affairs of, and invested in enterprises in violation of RICO." June 25 Order ¶¶ 1.A & B., ER 2-3. The court also found that it had "pendent jurisdiction over plaintiff's other claims under state and foreign law" because they "arise from a common nucleus of operative fact and are so intertwined with other matters pending before this court as to make the exercise of such jurisdiction * * * appropriate." June 25 Order ¶ 2, ER 4. Finally, the court held that issuance of a preliminary injunction was "appropriate on plaintiff's pendent claims, including * * * those for constructive trust and accounting" because: (1) "there is a substantial likelihood that the Philippines will prevail in this action [and] be entitled to an accounting, and * * * a constructive trust"; (2) "there is a substantial danger [that defendants] would transfer or conceal funds, property, books and records" resulting in "irreparabl[e] injury" to plaintiff Republic, for which it lacks an adequate remedy at law; and (3) "an injunction is necessary to preserve the status quo." June 25 Order ¶ 5, ER 50-52. The district court therefore "restrained and enjoined" defendants (and "those persons in active concert or participation with them who receive actual

notice of this order"), *inter alia*, "from, directly or indirectly:

> transferring, conveying, encumbering, dissipating, converting, concealing, or otherwise disposing of in any manner any funds, assets, claims or other property or assets owned or controlled by, or in the possession or custody of such individuals or entities, held by or in any way on behalf of or for the benefit of Ferdinand or Imelda Marcos * * *."

June 25 Order, ER 53-54.[3] The injunction applied to the property of the Marcos defendants that allegedly is situated in Switzerland, or elsewhere in the world, in addition to the United States. On June 26 and 30, 1986, defendants filed Notices of Appeal to this Court from the district court's order. ER 1141-47.

2. *The Panel Decision.*

On June 4, 1987, a panel of this Circuit (Kozinski and Hall, JJ., with Nelson, J., dissenting) vacated the preliminary injunction and ordered the case remanded for further proceedings.[4] *Republic of the Philippines* v. *Marcos*, 818 F.2d 1473, 1490 (9th Cir. 1987). In his opinion, Judge Kozinski first determined that the district court

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[3] The district court's order also restrained defendants, *et al.*, from taking possession of certain property held by the Customs Service, from transferring or otherwise disposing of certain identified pieces of property, and from destroying, concealing or otherwise disposing of any books, records, etc. pertaining to the properties in question or defendants' activities. June 25 Order, ER 52-55. The Order did permit Ferdinand and Imelda Marcos to use funds or assets in their possession (other than certain specifically identified property) "to pay attorneys' fees and normal living expenses." *Id.*

[4] On July 11, 1986, an earlier panel of this Court (Fletcher, Nelson and Thompson, JJ.) denied appellants' motion for both a stay of the preliminary injunction and a stay of the discovery ordered by the district court, pending appeal. ER 1148-49. *See* June 25 Order, ER 55.

had subject matter jurisdiction over the action by virtue of the RICO claims. Viewing the complaint under the "exceedingly generous" standard applicable to motions to dismiss, Judge Kozinski held that the RICO claims were not so "'wholly insubstantial and frivolous'"[5] as to warrant dismissal. 818 F.2d at 1477-78.[6] Judge Kozinski nevertheless held that the district court erred in issuing the injunction because the plaintiff Republic could not establish even a "fair chance of success on the merits" on its claims as framed under the "net worth" theory.

> To succeed under those claims as they are now presented, plaintiff would have to establish that practically all of Mr. Marcos' wealth was stolen. In light of plaintiff's own claims and assertions, we believe that it will be unable to do so because, as to many of the assets in question, adjudication will be barred by the act of state doctrine, the political question doctrine or both. Since plaintiff has not sought to trace specific assets to specific alleged misdeeds, the exclusion of large portions of Mr. Marcos' wealth from adjudication will defeat plaintiff's net worth analysis, and with it, its case. In these circumstances, we cannot say that the Republic has the "fair chance of success on the merits" needed to remand for a balancing of hardships.

818 F.2d at 1490 *quoting Benda* v. *Grand Lodge of the Int'l Assn of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Judge Hall concurred in Judge Kozinski's opinion, except for the

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[5] *Jackson Transit Auth.* v. *Local Division 1285*, 457 U.S. 15, 21 n.6 (1982) (*quoting Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946)).

[6] Judge Kozinski further held that the claimed violations of RICO did not present an "extraterritorial" problem since the Republic's "claim is based upon conduct that it charges took place in the United States: mail fraud and transportation of stolen property across international borders in violation of 18 U.S.C. §§ 1341, 1343, 2314, 2315." 818 F.2d at 1478.

finding of subject matter jurisdiction. She concluded that plaintiff had not demonstrated the requisite "adverse effects" on the economy of the United States to sustain the jurisdiction of the district court. 818 F.2d at 1489-90. Judge Nelson concurred with Judge Kozinski on subject matter jurisdiction but dissented from the vacation of the preliminary injunction. She concluded that "at this stage of the proceedings, the act of state doctrine does not have a negative impact on the calculus of the Philippines' likelihood of success" and the district court did not abuse its discretion in issuing the preliminary injunction. 818 F.2d at 1499, 1502. On November 16, 1987, this Court ordered that this case be reheard *en banc* and withdrew the previous three-judge panel assignment.

SUMMARY OF ARGUMENT

The district court concluded that "there is a substantial likelihood that the Philippines will prevail in this action" and therefore "be entitled to an accounting for, and to impose a constructive trust upon" all property held by, on behalf of, or for the benefit of Ferdinand or Imelda Marcos wherever located. June 25 Order, ER 51, 53-54. Based on that conclusion, the district court issued the preliminary injunction, applicable to assets located anywhere in the world, that is before this court for review. In our view, the record before the district court did not justify a finding of "substantial likelihood" that plaintiff will succeed in this suit in federal district court in California with respect to substantial portions of its claims as presently framed, and, hence, did not warrant an injunction of the scope issued.

A substantial probability of success on the merits is the *sine qua non* of preliminary injunctive relief. The district court record now before this court is extremely sketchy and provides little detail on the nature of plaintiff's claims against the Marcos defendants. The un-

developed state of record prevents a complete analysis of plaintiff's claims or the district court's power to adjudicate them. The factual assertions presented remain nonspecific at this stage of the proceedings and, in our view, are simply insufficient to justify a preliminary injunction of the scope issued by the district court.

When a preliminary injunction is sought in federal district court on the basis of a claim on the merits in that court, the "likelihood of success" inquiry includes the question whether the federal court has the power to hear the suit, and whether its adjudication of the claim is appropriate as a matter of prudential doctrines of major importance. The asserted basis for the district court's jurisdiction in this case is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), plus pendent jurisdiction. We agree with the district court and the panel that certain of the RICO claims appear sufficient to withstand a motion to dismiss those claims. But the portion of the property at issue that is associated with claims that may be cognizable under RICO appears thus far to be only a small portion of the case. The bulk of plaintiff's claims are contained in "state law" counts, which appear, in fact, to arise under the substantive law of the Philippines or perhaps other nations. (We refer to these, for convenience, as the nonfederal claims.)

The record before the district court, which did not include any detailed specification of the factual basis for the bulk of the nonfederal claims, did not make it possible even to analyze the extent to which those claims are properly before the court. First, it is not clear to what extent the bulk of plaintiff's nonfederal claims arise from a "common nucleus of operative fact" with the federal claims, as required for the exercise of pendent jurisdiction. Moreover, on the present record, it is not clear that the nonfederal claims will not so overwhelm the federal claims as to make federal jurisdiction in-

appropriate. The fact that the claims appear to arise largely under foreign law may also weigh against the exercise of pendent jurisdiction.

Even assuming jurisdiction, it is not clear at this stage that the district court should, as a prudential matter, undertake to adjudicate the bulk of the nonfederal claims. The court's capacity to do so fairly and expeditiously and without offending the sensibility of other nations cannot be resolved on this record. Adjudication in this district court may turn out to be barred by considerations of international comity and *forum non conveniens.*

The act of state doctrine seems to us to have little or no bearing on this case at this stage of its development. The doctrine provides, in general, that the validity of specific acts of a foreign sovereign is not subject to challenge in our courts; the circumstances of a particular case may, however, make that general principle inapplicable. On the present record, it is not clear that any act of state—an act of a sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty—is involved in this case. Nor is it clear that the case would require an adjudication of the validity of such an act, without which the case could not fairly proceed. Under these circumstances, the bearing, if any, of the act of state doctrine on this case should be determined only after further development of the case on the merits.

ARGUMENT

I. THE RECORD BEFORE THE DISTRICT COURT DID NOT FURNISH AN ADEQUATE BASIS FOR IT TO FIND A "SUBSTANTIAL LIKELIHOOD" OF SUCCESS ON THE BULK OF THE PLAINTIFF'S CLAIM SO AS TO JUSTIFY A PRELIMINARY INJUNCTION OF THE SCOPE ENTERED.

The district court based its global preliminary injunction on the finding that "there is a substantial likelihood that the Philippines will prevail in this action." June 25 Order, ER 51. In reaching this finding, the district court failed to give sufficient consideration to several factors that, on the present record, may pose substantial obstacles to plaintiff's succeeding, in that court, on most of its claim on the merits. Taken together, these factors substantially reduce the likelihood that plaintiff will succeed on the merits with respect to the bulk of its claim as presently pleaded.[7] Accordingly, in our view, the district court erred in concluding that plaintiff had shown a "substantial likelihood" of success on the merits as to the bulk of its claim sufficient to warrant an injunction of the scope issued.

A. Factual And Legal Underpinnings Of Plaintiff's Case.

1. *Standards For Preliminary Relief.* It is axiomatic that a plaintiff must make the requisite showing of like-

[7] We emphasize again that our analysis is based upon the case as pleaded in the complaint upon which the district court entered the preliminary injunction. Very different questions would be presented by: (1) a complaint making claims whose resolution in the district court could be more specifically analyzed; (2) a complaint seeking to recover more specifically identified property within the jurisdiction of the district court; or (3) a request for preliminary relief as to property located within the jurisdiction of the district court pending an adjudication elsewhere of the bulk of plaintiff's claims against the defendants. *Compare Republic of the Philippines v. Marcos*, 806 F.2d 344, 361 (2d Cir. 1986).

lihood of success on the merits with respect to a substantial portion of its claim to warrant preliminary relief of the scope requested. *See Amoco Production Co.* v. *Village of Gambell*, —— U.S. ——, 107 S.Ct. 1396, 1404 n.12 (1987); *University of Texas* v. *Camenisch*, 451 U.S. 390, 392 (1981); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).[8] A plaintiff who makes a sufficient showing of likelihood of entitlement to recover identifiable assets *in specie* may be entitled to preliminary relief to protect those assets, and a plaintiff who makes a sufficient showing on a substantial damage claim may be entitled to preliminary relief to protect the enforceability of that claim; on the other hand, a small claim, however valid, will not support a world-wide preliminary injunction against a wealthy defendant where the injunction is much broader than necessary to protect the claim. As this court has stated in another context, "[a] district court's power to issue a preliminary injunction should not be broader in scope * * * than its power following

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[8] Plaintiff argues that a preliminary injunction can be sustained on some lesser standard of probable success, such as whether "serious questions are presented." *See* Brief of Plaintiff-Appellee, at 56-57; Petition For Rehearing And Suggestion For Rehearing *En Banc*, at 7 & n.5; Reply Brief In Support Of Petition For Rehearing And Suggestion For Rehearing *En Banc*, at 5 & n.2. We disagree and believe that the proper standard is whether plaintiff has shown "a likelihood of success on the merits." *See Amoco Production Co.* v. *Village of Gambell*, —— U.S. ——, 107 S.Ct. 1396, 1404 n.12 (1987) and cases cited pp. 13 *supra*. We also question whether a preliminary injunction, issued in the district court's discretion after consideration of both the probabilities on the merits and the risk of harm to the parties, could be sustained on a entirely different legal standard than that explicitly adopted by the district court in granting plaintiff's request. In any event, it would be entirely inappropriate to issue a global injunction against any defendant without requiring the plaintiff to show *at least* "a fair chance of success on the merits." *Sierra On-Line, Inc.* v. *Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) *quoting Benda* v. *Grand Lodge of the Int'l Ass'n of Machinists*, 584 F.2d at 315. "No chance of success at all, however, will not suffice." *Id.*

a full trial on the merits." *Zepeda* v. *INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1985).[9]

2. *State Of The Record.* The record before the district court did not set forth the factual basis for more than a small fraction of the plaintiff's claim. Instead, plaintiff relied on a showing of the Marcoses' unexplained "net worth" to demonstrate that plaintiff will eventually be able to prove its entitlement to recover substantially all of that property.

However useful the "net worth" approach may be as a means of estimating the size of the Marcoses' alleged misdeeds, this approach makes it extraordinarily difficult to estimate how much of plaintiff's claim is properly before the district court. That court simply had no way of judging, for example, how much of the specific misconduct that will eventually be alleged actually occurred in or had a nexus to California (or the United States); to what extent plaintiff or individual Philippine citizens whom plaintiff seeks to represent were injured by actions having such a nexus; how much of the claimed property is in or ever passed through the United States; what "common nuclei of operative fact" exist between plaintiff's (and its citizens') claims arising under U.S. federal law and other claims over which plaintiff seeks to have the court exercised pendent jurisdiction; what states' or countries' substantive law is applicable to what portions of the claims; where witnesses and evidence bearing on many of the claims are likely to be located; or what foreign countries' sensibilities may be affected by the relief requested on the merits. Compounding the prob-

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[9] This court's standard of review of issuance of the preliminary injunction is whether the district court abused its discretion by applying either an erroneous legal standard or reaching a clearly erroneous finding of fact. *Regents of Univ. of California* v. *ABC, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984). Legal issues are, of course, reviewed *de novo*. *International Molders' & Allied Workers' Local Union No. 164* v. *Nelson*, 799 F.2d 547, 551 (9th Cir. 1986).

lems resulting from lack of other factual allegations is the difficulty that plaintiffs offered no explication of Philippine law—which, as foreign law, must be alleged and proven—that allegedly rendered unlawful the Marcos defendants' acquisition of the property in question from the Philippines and its people. Nor does the complaint contain allegations concerning other foreign law that may be applicable, such as that of Switzerland, where most of the Marcos defendants' assets are said to be located. These features of the complaint before the district court when it entered the preliminary injunction make it impossible to estimate what difficulties the court may encounter in resolving substantive legal issues.

3. *Basis For Federal Jurisdiction.* To bring the issues which the present appeal presents properly into focus, an analysis of the source of the substantive rights that form the basis for plaintiff's claims—and the relationship of the bulk of those claims to the jurisdiction of the federal courts—is necessary.

Under our federal system, the federal courts are courts of limited jurisdiction, and the States ordinarily have authority only with respect to matters having an effect within their borders. These limitations on the exercise of jurisdiction serve to confine federal and state courts to matters with which they may properly be concerned and that are presented to them in a manner that is appropriate for judicial resolution under our system of separated powers. The plaintiff in this action seeks to recover, *in the aggregate*, all of the assets of the Marcos defendants, which it contends were improperly obtained from plaintiff and those Philippine citizens who were the victims of the defendants' actions over the course of 20 years. However, each separate transaction or occurrence by which the defendants allegedly acquired a given portion of the Marcos defendants' current assets from plaintiff or one or more Philippine citizens presumably would give rise to a separate claim for damages and/or return

of property. Some of those distinct claims might have a nexus to the United States (and to California, the forum state), and some might not. For these reasons, it is necessary, solely as a matter of the domestic law of the United States applicable to judicial proceedings generally, to determine which of the claims comprising the plaintiff's aggregate submission actually may be brought in the particular court whose jurisdiction the plaintiff has invoked.

Subject matter jurisdiction in this case is invoked under the federal question statute, 28 U.S.C. 1331, based on claims arising under the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. § 1961 *et seq.*, plus pendent jurisdiction. Complaint ¶ 2, ER 3. The RICO claims include allegations of: (1) transportation and/or receipt of stolen property in interstate and/or foreign commerce in violation of 18 U.S.C. §§ 2314, 2315 (*i.e.*, transfer of stolen funds for acquisition of both real and personal property within California); (2) mail and wire fraud in interstate and/or foreign commerce in violation of 18 U.S.C. §§ 1341, 1343 (*i.e.*, use of mail and wire communications in connection with investments in California of funds from the alleged fraudulent scheme); (3) investment of proceeds derived from a pattern of racketeering activity in other enterprises in interstate and/or foreign commerce (including property and bank accounts in California); and (4) conspiracy to commit violations (including certain overt acts allegedly committed in California). Complaint ¶¶ 18-24, 27-32, 34-37, 38-41, ER 13-21. The district court and the panel concluded that the pleadings set forth a basis for RICO jurisdiction sufficient to avoid dismissal. We agree. *See Jackson Transit Auth.* v. *Local Division 1285*, 457 U.S. 15, 21 n.6 (1982); *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946). *See also Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 496 & n.14 (1985); *Sun Sav. & Loan Ass'n* v. *Dierdorff*, 825 F.2d 187 (9th Cir. 1987); *United States* v. *Wyatt*, 807 F.2d 1480, 1483 (9th

Cir. 1987); *Schreiber Distributing Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986); *United States* v. *Tille*, 729 F.2d 615 (9th Cir.), *cert. denied*, 469 U.S. 845 (1984).[10] To the extent, however, that plaintiff's allegations concern activities lacking any nexus to the United States, we do not believe such allegations could provide a basis for federal jurisdiction as such. *See Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 608-15 (9th Cir. 1977).[11]

Thus, most of plaintiff's claims as pleaded do not properly arise under RICO. Nor do they have any articulated connection with the Central District of California—or, indeed, the United States. Substantially all of the conduct by which the defendants are alleged to have actually deprived plaintiff and the people of the Philippines of their property took place in the Philippines. Complaint ¶¶ 1, 12-14, 16-17 (1.5 billion dollars acquired through fraudulent conversion of properties in the Philippines deposited in Swiss banks), ER 2, 7-8, 9. While plaintiff has alleged certain conduct in the United States involving $4.8 million worth of property located within California that was acquired with the proceeds of unlawful conduct in the Philippines (Complaint ¶¶ 6, 9, 19-24, ER 4-7, 9-11), that is less than 1% of the total amount claimed by the plaintiff in this case. Almost all of the property claimed by the Republic is allegedly located in Switzerland. Complaint ¶ 6, ER 4-5.[12]

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[10] However, the ability to survive a motion to dismiss, under the Ninth Circuit's standard, does not preclude the possibility that the RICO claims will later be dismissed on jurisdictional grounds—a possibility that may affect the overall assessment of plaintiff's likelihood of success on the merits.

[11] We, of course, do not suggest that conduct occurring outside the United States cannot properly be regarded as part of the activities of a RICO enterprise for purpose of a criminal prosecution in the United States.

[12] $50 million in illegally acquired property is allegedly located in New York, where it is subject to separate proceedings brought by

The vast majority of plaintiff's claims (by dollar volume) appears to be nonfederal claims arising from conduct, and relating to property, situated outside of the United States. Complaint ¶¶ 43, 49-52, 57-59, 71-74, ER 21, 23-24, 25-26, 28. Such claims could be considered by the federal district court only through the exercise of pendent jurisdiction, applying state law. Moreover, they are state law claims only in the sense that the district court presumably should look to California's choice of law rules, since California cannot prescribe substantive rules governing conduct occurring (and property located) wholly outside of that state that has no effect within that state, and the laws of the United States (including those of the states) ordinarily do not reach conduct outside the United States that has no effect on the United States and does not involve its nationals. *See e.g.*, Restatement (Proposed) of Foreign Relations Law § 403 (Tent. Draft No. 7, 1986) (limitations on jurisdiction to prescribe). *See also Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (L. Hand, J.).

Rather, where the conduct by which the defendants allegedly acquired the property in the first instance occurred in the Philippines, the lawfulness of that conduct will presumably turn on the Philippine law governing conversion, breach of trust, bribery, extortion or other means by which plaintiff in the future might allege with greater particularity that the defendants wrongfully acquired specific property from the plaintiff or its people. And because plaintiff alleges that the vast majority of the Marcos defendants' property that represents the pro-

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the plaintiff that resulted in an order of attachment. *See Republic of the Philippines* v. *Marcos*, 806 F.2d 344 (2d Cir. 1986). $7 million is allegedly located in Hawaii (Complaint ¶ 6, ER 4-5), where, again, it is subject to separate proceedings. *Azurin* v. *Von Raab*, 803 F.2d 993 (9th Cir. 1986).

ceeds of that conduct is situated in Switzerland, the question of the application of a constructive trust to that property presumably must be informed by Swiss law. Under California's choice of law rules, either Philippine or Swiss substantive law will govern the vast majority of plaintiff's claims for damages and to recover (or have a constructive trust imposed upon) certain property. *See* Restatement (Second) of Conflict of Laws §§ 6, 145, 221, 222 (1971) (applying the law of the state with the "most significant relationship" to the case). *Compare* Complaint ¶¶ 12, 16, ER 7, 9.

B. Potential Obstacles Which The Court Should Consider In Assessing Plaintiff's Likelihood Of Success On The Merits.

The discussion above demonstrates that, for present purposes, the majority of the assets plaintiff seeks to recover should be regarded as associated with plaintiff's claims that do not arise directly under U.S. federal law. The general nature of plaintiff's allegations at this stage of the litigation prevents a definitive analysis of the likelihood that plaintiff will succeed on the merits of those claims. But at least on the present record, it appears that considerations of pendent jurisdiction, comity, and *forum non conveniens* may pose significant obstacles and therefore must be taken into account in considering the propriety of preliminary injunctive relief of world-wide scope.

1. *Pendent Jurisdiction.* In *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the Supreme Court set forth the analysis to be used in determining whether nonfederal claims are properly "pendent." The Court noted that if the "state and federal claims * * * derive from a common nucleus of operative fact," then "there is *power* in the federal courts to hear the whole [case]," provided that "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." 383

U.S. at 725 (emphasis in original). However, the Court emphasized that the doctrine was one "of discretion, not of plaintiff's right" and was motivated by "consideration of judicial economy, convenience and fairness to litigants." 383 U.S. at 725.

> [I]f these [considerations] are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them. [citation omitted]. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. * * * Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

383 U.S. at 726-27 (footnotes omitted). The Court added that "recognition of a federal court's wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant's effort to impose upon it what is in effect only a state law case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." 383 U.S. at 726-27. *See also* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3567.1, at 139 n.23 (1984).

It is very difficult to even analyze the application of the *Gibbs* considerations to plaintiff's nonfederal claims on the record that was before the district court when it entered the preliminary injunction.[13] First, the present

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[13] We note the existence of case authority supporting issuance of a preliminary injunction on pendent "state law" claims in a RICO case brought by foreign plaintiffs against a foreign defendant. *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94, 96-98 (6th

record does not make it clear that there is a "common nucleus of operative fact" between the RICO claims related to property (and transactions) in California and the bulk of the nonfederal claims.[14] Second, quite aside from this fundamental jurisdictional prerequisite, the pendent claims as pleaded appear to involve substantial questions—only some of which can even be identified—of Philippine (and perhaps other foreign) law for which a foreign forum would provide "a surer-footed reading of applicable law" than a federal district court in California.[15] Third, since it appears on the present record

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Cir. 1982). However, the injunction in that case was not of a worldwide scope but was limited to "such proceeds or properties which are *within the jurisdiction of this Court* until a court of competent jurisdiction has determined finally the question of whether or not the [foreign plaintiffs] have a rightful claim to the properties and monies held * * * *in this country*." *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 539 F. Supp. 807, 814-15, 816 (W.D. Ky. 1982) (emphasis added), *aff'd*, 689 F.2d 94 (6th Cir. 1982).

[14] The RICO claims on which the district court rested its jurisdiction depend upon proof of predicate acts in the United States and the Central District of California (ER 13-21); the "pendent" claims under foreign law, by contrast, do not. Moreover, although the RICO claims based on activities in the United States (upon which the district court relied) presumably will also depend upon a showing that the property at issue was illegally obtained by means of particular transactions or conduct in the Philippines, the complaint and record do not establish that those transactions or conduct underlying the RICO claims share a common nucleus of operative facts with other transaction or occurrences in the Philippines by which the defendants allegedly obtained the property that is in Switzerland and that underlies most of plaintiff's pendent claims.

[15] For example, plaintiff has claimed that Mr. and Mrs. Marcos, by reason of their positions as President of the Philippines and Governor of Manila respectively, committed constructive fraud against plaintiff Republic as a result of breach of the trust and confidence reposed in them in those positions. Complaint ¶¶ 56-60, ER 25-26. Plaintiff also alleges that Ferdinand Marcos individually breached an implied contract with plaintiff Republic by failing to adhere to his oath of office. Complaint ¶¶ 70-75, ER 27-28. See discussion of *forum non conveniens*, at p. 27-30, *infra*.

that only a small fraction of the asserts involved in the complaint is covered by the federal claims as presently pleaded, the present record does not provide any basis to escape the conclusion that "state law issues" substantially predominate with respect to the "terms of proof, * * * the scope of the issues raised, [and] the comprehensiveness of the remedy sought." *United Mine Workers* v. *Gibbs*, 383 U.S. at 726.[16]

2. *International Comity.* Considerations of international comity present an additional reason to question whether the district court should exercise pendent jurisdiction over plaintiff's "state law" claims and whether the global preliminary injunction was proper. As we have noted above, the vast bulk of the pendent claims appears, on the present record, to require the application of the law of a foreign country to transactions occurring within its own borders and in which the recovery claimed also involves assets with no articulated connection with the United States.

There are limits on the degree to which a United States court should attempt to resolve such wholly foreign disputes. As the Supreme Court noted in the case of *Hilton*

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[16] It appears that, prior to seeking federal court relief, plaintiff had previously sought (and received) from a California state court preliminary relief in the form of a temporary restraining order, prohibiting defendants from transferring or otherwise secreting the bank accounts in the possession of Lloyd's Bank, which accounts are referred to in paragraphs 22-24 of plaintiff's federal complaint. *Compare* Complaint ¶¶ 22-24, ER 11-12 *with* May 20, 1986 Order To Show Cause Re: Preliminary Injunction and Temporary Restraining Order (Sup. Ct., Cty. of Los Angeles), ER 426-28. We understand that plaintiff has also now filed a Complaint before the Superior Court of the County of Los Angeles containing allegations that encompass all of the allegations made in its initial complaint in this case, including the claims under RICO. *Republic of the Philippines* v. *Marcos*, No. 637903 (Sup. Ct., Cty. of Los Angeles). *See Lou* v. *Belzberg*, No. 86-6057 (9th Cir. November 12, 1987) (concurrent state and federal jurisdiction over RICO claims).

v. *Guyot*, "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." 159 U.S. 113, 163-64 (1895). Rather, there are limits to "the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation * * *." These limits—commonly described under the term "comity"—are part of the "spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *See also Societe Nationale Industrielle Aerospatiale* v. *United States District Court For The Southern District Of Iowa*, —— U.S. ——, 107 S.Ct. 2542, 2555 n.27 (1987). The primary reasons for these limits are the avoidance of conflict and discord with foreign authorities, *see, e.g., Canadian Filter (Harwich) Ltd.* v. *Lear-Siegler, Inc.*, 412 F.2d 577, 578 (1st Cir. 1969); *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F.2d 633, 647 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956), and the very basic concern of "whether a decree will be practically enforceable." D. Dobbs, *Remedies*, § 2.12, at 133 (1973).

In *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1977), this Court discussed the limitations on the extraterritorial exercise of federal jurisdiction in much the same terms, noting that a court, seeking to resolve such an issue, would have to weigh:

> the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the location or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is

> explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614.[17]

These concerns are obviously relevant to this case, although their relevance is difficult to specify or quantify on the present record. But, for example, the trial in a federal court in California of claims concerning property that never passed through the United States and is now allegedly located in Switzerland—where plaintiff alleges most of its property came to rest, Complaint ¶ 16, ER 9—might well cause needless conflict with Swiss authorities. And, any decree entered by the California district court regarding that property in Switzerland may well run into very practical problems of both acceptance and ultimate enforcement by those same Swiss authorities.[18]

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[17] These "comity" concerns also lend additional weight to the doubts raised above concerning pendent jurisdiction in this case. In *Vespa Of America Corp.* v. *Bajaj Auto, Ltd.*, 550 F. Supp. 224 (N.D. Cal. 1982), the court was faced with a dispute between two wholly foreign corporations over a contract entered into abroad where plaintiff's claim under the Lanham Act—the sole basis for federal jurisdiction—involved a mere 2000 units sold in the U.S. out of 80,000 units world-wide. Viewing plaintiff's pendent claims under foreign law as attempts to circumvent the limitations established under *Timberlane*, the district court analyzed whether the vast bulk of plaintiff's foreign law claims in that case were properly pendent by application of the *Timberlane* factors. 550 F. Supp. at 229-31. Ultimately, the district court concluded that it would adjudicate the limited federal Lanham Act claim but would remit plaintiff to the foreign fora for resolution of its pendent claims. *Id.* at 231.

[18] Thus, it is not a sufficient answer to these comity concerns to note that the plaintiff here is the Republic of the Philippines. Further, comity is not a matter only of foreign relations but also con-

3. *Forum Non Conveniens.* Finally, the doctrine of *forum non conveniens* also bears on the appropriateness of adjudicating the bulk of plaintiff's claims in the district court. In general, the doctrine provides that when an available, alternative forum has jurisdiction to hear a case, a federal court may, in the exercise of its sound discretion—considering the interests of both the litigants and of the forum—dismiss the case and direct the plaintiff to the alternative forum. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947). The interests of the forum are an important part of the doctrine. In *Reyno*, the Supreme Court pointed out that the doctrine "is designed in part to help courts avoid conducting complex exercises in comparative law." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 250-51.[19] *See also Id.* ("public interest factors point toward dismissal where the court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.'") *quoting Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 509. *See also In re Union Carbide Corporation Gas Plant Disaster at Bhopal, India In December, 1984*, 809 F.2d 195 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 199 (1987).

The plaintiff Republic has instituted a civil action against defendants in the Philippines, seeking a recovery of the scope presented in this case. *Republic of the Philippines* v. *Marcos*, No. PCGG-3, No. 0002 (Sandiganbayan). There are, however, practical impediments to the Mar-

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cerns the role of the judicial authority of this nation and reflects principles of self-restraint applied by the courts of the United States that are not necessarily overcome by the fact that the government of a foreign nation appears as the plaintiff.

[19] In the plurality portion of his opinion, Justice Marshall also noted that a "distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified" in applying the doctrine in the federal courts. 454 U.S. at 255.

coses' return to the Philippines.[20] Even if—and this point is not entirely clear on the record—this renders the Philippine forum "unavailable" for purposes of the doctrine of *forum non conveniens*, there is authority for the proposition that practical impediments to the hearing of claims in the appropriate forum do not prevent an inappropriate forum from dismissing those claims. *See Islamic Republic of Iran* v. *Pahlavi*, 94 App. Div. 2d 374, 375-77, 464 N.Y.S.2d 478 (1st Dept. 1983) (suit against the Shah by Iran "is an Iranian matter * * * based on acts in Iran relating to the affairs of Iran."), *aff'd*, 62 N.Y.2d 474, 479-84, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985). The possibility of claims against property in Switzerland or elsewhere might also be explored. For these reasons, the district court should have considered the possibility that it would refrain from adjudicating the bulk of plaintiff's nonfederal claims (as presently framed) on *forum non conveniens* grounds, while proceeding to adjudicate those portions of plaintiff's claims that have a connection with the United States. *Contrast Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 361 (2d Cir. 1986).[21] *See also Vespa of America Corp.* v. *Bajaj Auto, Ltd.*, 550 F. Supp. 224 (N.D. Cal. 1982); *Packard Instrument Co., Inc.* v.

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[20] We understand that the Government of the Philippines has prohibited the Marcos defendants from returning. In addition, the United States, in the public interest of the nation, has imposed a departure control order on defendant Ferdinand Marcos.

[21] This case is unlike the Second Circuit's decision in *Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 361 (2d Cir. 1986) where the Court, in denying a dismissal on grounds of forum *non conveniens*, noted that the "complaint only seeks United States' recognition of a Philippine decree" and therefore that the "district court will not be asked to try the basic issues accusing President Marcos of unlawful takings." As presently framed, the Complaint filed by the Republic in the present case appears to seek federal court resolution of precisely such "basic issues." *See, e.g.*, Complaint ¶¶ 1, 12-15, ER 2, 7-9.

Beckman Instruments, Inc., 346 F. Supp. 408 (N.D Ill. 1972).

* * * * *

In sum, we think the plaintiff, pleading substantial nonfederal claims, did not provide a sufficient basis, as of the time the preliminary injunction was issued, to conclude that those claims belong in and should be adjudicated by the district court. For that reason, the record before the district court did not warrant the conclusion that there is a "substantial likelihood" that plaintiff will prove its entitlement to an accounting and a constructive trust with respect to the bulk of the property claimed. Under these circumstances, we do not believe it was appropriate to grant preliminary relief of the scope awarded by the district court.

II. THIS COURT NEED NOT RESOLVE THE APPLICABILITY OF THE ACT OF STATE DOCTRINE TO THE PRESENT CASE.

Given the lack of specificity and development of this case at this stage, the potential application of the act of state doctrine to this case remains speculative. For that reason we are unable to offer a view as to the final resolution of the doctrine in this case. We do, however, provide for the Court's consideration an explanation of our understanding of the doctrine.

The act of state doctrine actually has limited and rather precise contours and does not ordinarily require the dismissal of a suit merely because the suit touches on foreign relations concerns.[22] The "classic" formulation

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[22] For example, in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416 (1964)—the source for modern application of the doctrine—the effect of application of the act of state doctrine was not dismissal, but rather application of the act of state as the rule of decision in the case. *See* 376 U.S. at 428-37. *Cf. Baker* v. *Carr*, 369 U.S. 186, 211 (1962). *See also* pp. 33 *infra*.

of the doctrine was set forth in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Although this quotation from *Underhill* suggests that the doctrine is absolute, the Supreme Court has so far declined to lay down an "inflexible and all-encompassing" rule. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 428.[23] *See also First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976). There are accordingly several distinct questions which must be addressed in determining whether the act of state doctrine applies in a particular case.

First, application of the act of state doctrine requires a court to carefully define the specific conduct complained of. *Cf. IAM* v. *OPEC*, 649 F.2d 1354, 1357 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) ("A critical step * * * is defining exactly what [the] activity is" since "[t]he * * * question may be determined by how broadly or narrowly that activity is defined."). The defendant normally has the burden to establish that the challenged conduct involves an act of state. *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. at 694.[24]

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[23] Indeed, in *Sabbatino*, the Court concluded that, while the expropriation in that case was an act of state whose validity would not be considered by United States courts, "[t]he balance of relevant considerations" might permit a different result in other circumstances. 376 U.S. at 428.

[24] In a preliminary injunction context, of course, a moving party must demonstrate its likelihood of success on the merits, including

Second, the conduct at issue must be an act of the sovereign. *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. at 694-95. That is, the conduct at issue must be a "public act," involving an exercise of sovereign authority. *Jimenez* v. *Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963). *See also Alfred Dunhill of London* v. *Republic of Cuba*, 425 U.S. at 695 (act must be "public and governmental"). As the prior panel in this case observed, "not everything a public official does is an official act; to the extent Mr. Marcos engaged in actions as a private citizen, he is subject to suit like anyone else." *Republic of the Philippines* v. *Marcos*, 818 F.2d at 1484. *See also Jimenez* v. *Aristeguieta*, 311 F.2d at 557-58. Of course, when the governmental official involved is the former head of state, this public-private distinction may sometimes be a difficult one to draw. *See De Roburt* v. *Gannett Co., Inc.*, 733 F.2d 701, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). It is still necessary, however, to inquire in such a case whether the specific act in question purports to be an exercise of sovereign authority.

Third, the "sovereign act" must be an exercise of the sovereign's jurisdiction within its territory. To the extent that the sovereign attempts to exercise *extra*territorial jurisdiction with respect to conduct or property elsewhere, the doctrine ordinarily does not apply. *See Allied Bank Int'l* v. *Banco Credito Agricola De Cartago*, 757 F.2d 516, 521-22 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985).

Fourth, the act of state doctrine is a choice of law rule mandating that a foreign government's action within

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its ability to overcome those defenses that are clearly implicated by the complaint. Accordingly, if the claim as pleaded by the plaintiff demonstrates the existence of an act of state question, the district court would be required to address that question in ruling on a request for preliminary relief.

its own jurisdiction "be accepted by our courts as a rule for their decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 309 (1918). If resolution of the questions presented by the suit does not place in issue the validity of a specific governmental act (which act can be accepted as the rule of decision in the courts of the United States), the act of state doctrine has no application. *See Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d at 608; Restatement (Proposed) Of Foreign Relations Law § 469, comment 7 (Tent. Draft No. 7, 1986). *See also Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 545-46 (S.D.N.Y. 1984).

Fifth, even if the validity of a foreign governmental act is directly placed at issue, it must be the *sort* to which the act of state doctrine applies. In *Dunhill*, for example, four Justices concluded that the act of state doctrine does not apply to the repudiation by the foreign sovereign (or one of its instrumentalities) of an ordinary commercial debt. *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. at 695-706 (opinion of White, J.).

Sixth, even if the conduct was an act of state, that does not end the matter. In *Sabbatino*, the Court concluded that the expropriation in that case was an act of state whose validity would not be considered by United States courts, but it observed that "[t]he balance of relevant considerations" might permit another result in different circumstances. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 428.

Putting to one side whatever generalized considerations of international comity and separation of powers may underline the act of state doctrine, a primary consideration for the court is whether adjudication of the particular suit will adversely affect the foreign policy interests of the United States, which interests are the responsibility of the Executive Branch. *First Nat'l City Bank* v. *Banco Nacional De Cuba*, 406 U.S. 759, 767-70 (1972). In this case, the Department of State has in-

formed us that there are no foreign policy interests of the United States in our present relations with the government of the Philippines that would be adversely affected by adjudication.[25] The Supreme Court also noted in *Sabbatino* that the "balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence * * * for the political interests of this country may, as a result, be measurably altered." 376 U.S. at 428. *See also Republic of the Philippines* v. *Marcos*, 806 F.2d at 359.[26]

Accordingly, the act of state doctrine is, in our view, a narrower concept than that suggested in the panel opinion. The doctrine simply does not provide blanket coverage to any activity engaged in by a foreign official. Instead, application of the doctrine depends upon the resolution of a number of discrete factual issues in the sequential and orderly fashion outlined above.[27]

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[25] For purposes of an act of state analysis, we assume that the present government of the Philippines understands the risk that our courts may declare that "Mr. Marcos' actions were entirely legal and proper." *Republic of the Philippines* v. *Marcos*, 818 F.2d at 1485 n.14.

[26] On the other hand, there may be more reason for a court of the United States to hesitate before adjudicating the validity of an official act under the laws of the foreign nation, as distinguished from international law (*Sabbatino*, 376 U.S. at 415 n.118; *cf. Pennhurst State School And Hospital* v. *Halderman*, 465 U.S. 89 (1984)), or where the conduct in question does not have a nexus to interests of the United States.

[27] We would also suggest that the factual issues revolving around the act of state question are complex enough to warrant reserving judgment on the application of the act of state doctrine even in general terms and holding the doctrine in reserve and considering its application only after the district court has satisfied itself that it has jurisdiction over the matter and that the doctrines of comity and *forum non conveniens* would not argue in favor of abstention. It simply makes little sense to engage in full-blown act of state analysis in the abstract only to conclude, at the end, that the court cannot properly consider the matter at all under its pendent jurisdiction.

On the present record, it is not clear that any act of state—any act of a sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty—is involved in this case. Nor is it clear that the case would require an adjudication of the validity of such an act, without which the case could not fairly proceed. For these reasons, it is impossible to determine, with any degree of confidence at this stage of the proceedings, whether the act of state doctrine will play a major role in the resolution of this case. The application of the other doctrines outlined above, including pendent jurisdiction, comity and *forum non conveniens* may well carve out of the case some or all those portions of the case that the panel believed presented act of state concerns. Moreover, the application of the act of state doctrine to the remaining portions of the case will be dependent upon further factual development.

CONCLUSION

The plaintiff Philippine Republic has brought an extraordinarily broad cause of action, both in terms of the underlying acts which support its claims and the scope of relief sought against Mr. Marcos. It has brought this action in a U.S. court, notwithstanding the fact that most of the actions complained of appear to have occurred overseas and the bulk of the assets appear to be located abroad. While the Republic, like any other litigant, has every right to press such a claim, the factual and legal burdens it assumes in bringing such an action are substantial if it is ultimately to obtain the relief requested.

As is true with its burden on the merits, the Republic faces a substantial burden in supporting its extraordinary request for preliminary relief. Without prejudice to its ability to either provide additional legal and factual support for its claims as currently pleaded or, in the alternative, to narrow the focus of its action, we believe

that the Republic has failed to demonstrate the requisite likelihood of success on the merits of its claims to support its request for preliminary relief. Accordingly, we would respectfully suggest that the preliminary injunction issued in this case should be vacated and the matter remanded to the district court for further consideration.

Respectfully submitted,

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STATUTORY PROVISIONS

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (re-

lating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.)

[1] So in original. Probably should be "subsection".

STATUTES INVOLVED

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed

from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such

terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the prop-

erty pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section

without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), which ever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's

acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(n) [1] If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the

activities of which affect interestate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.)